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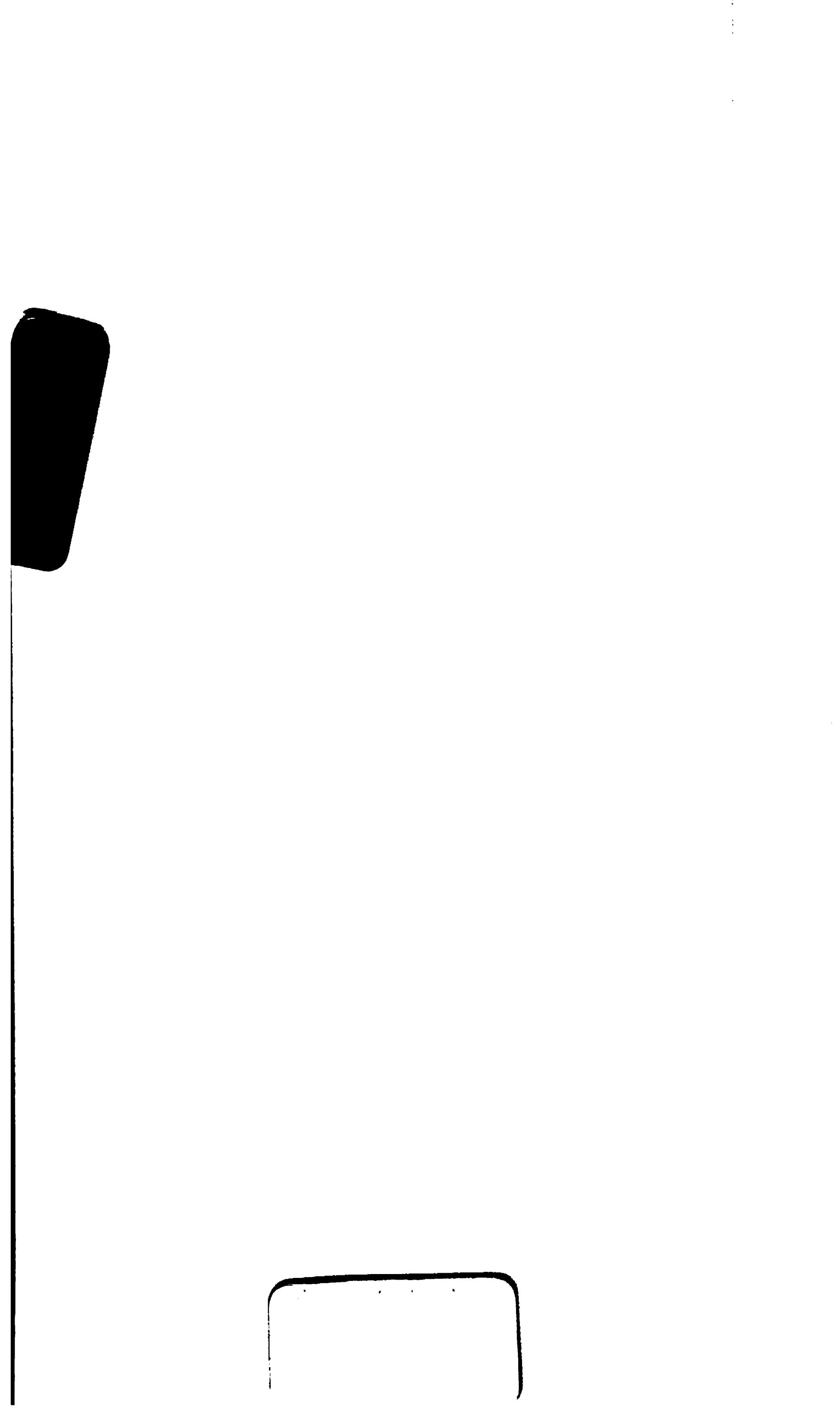
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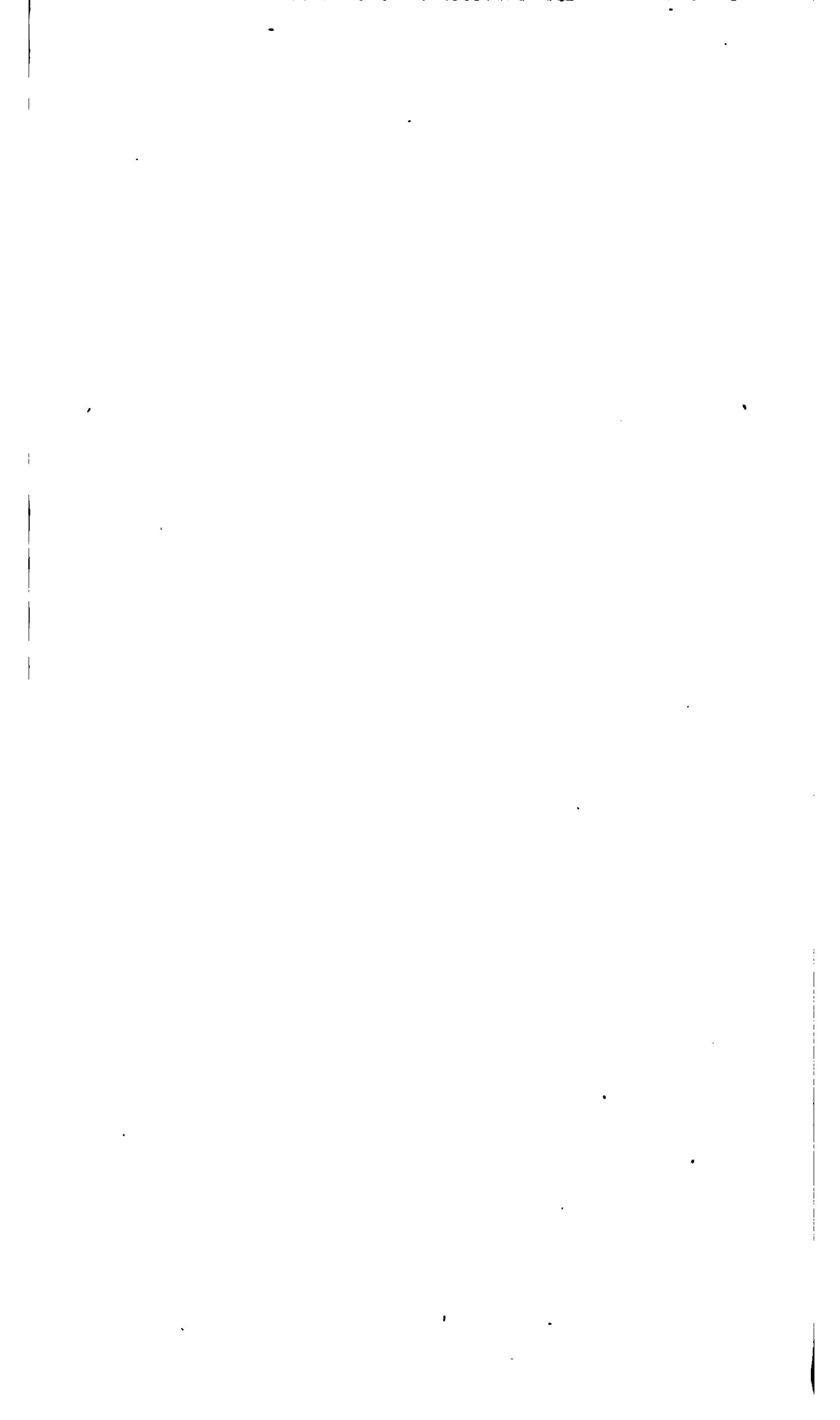
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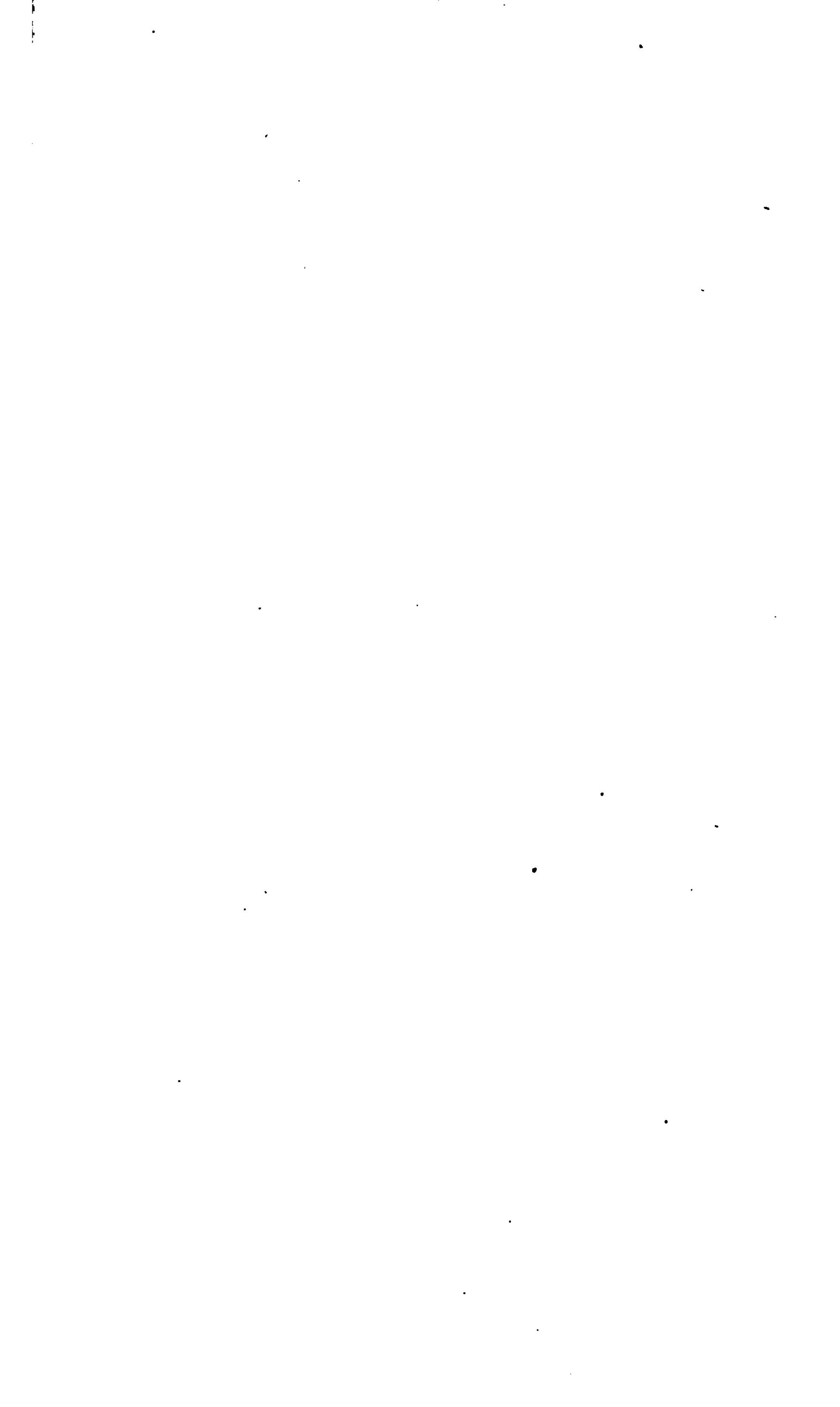
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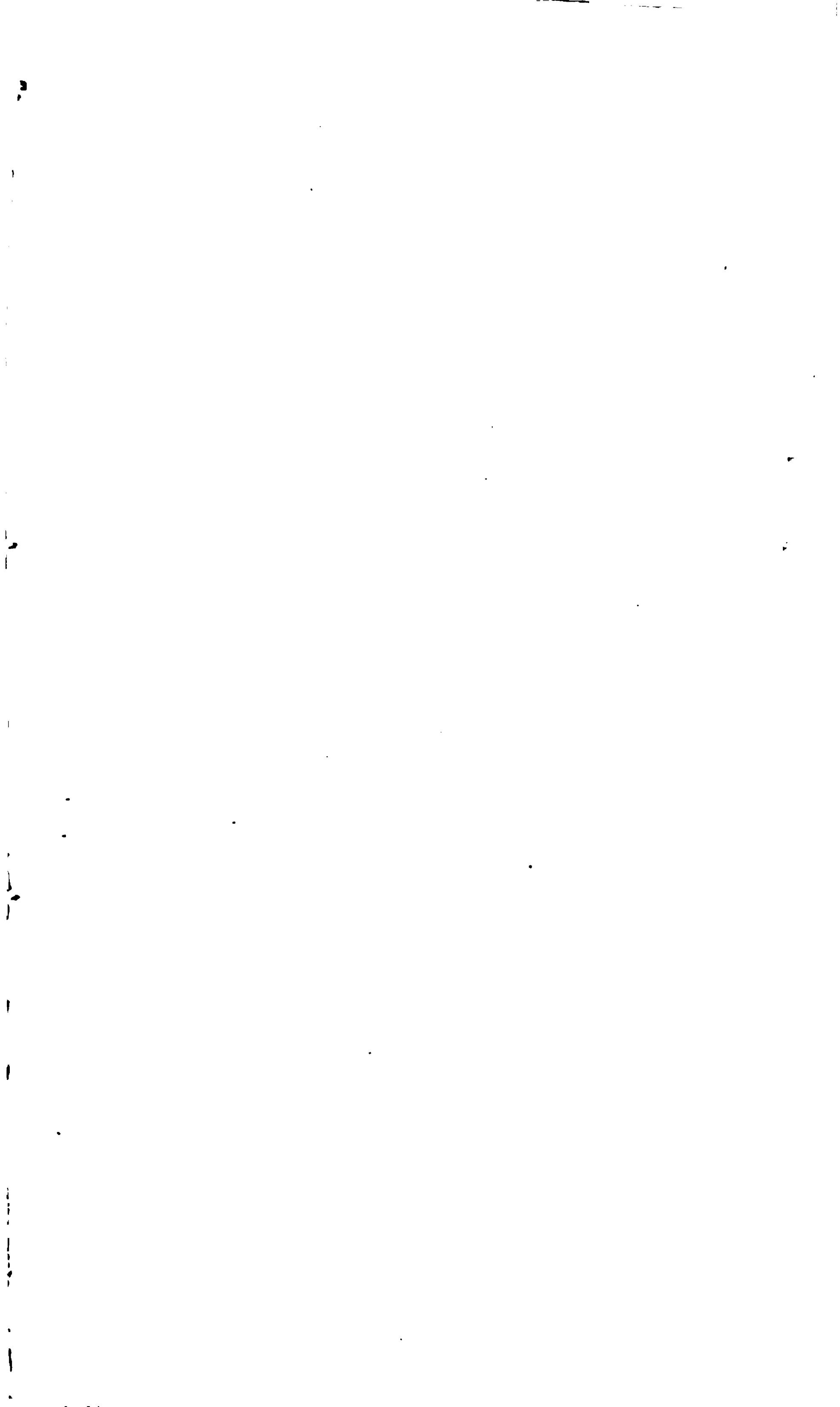
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THE
AMERICAN DECISIONS
CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY
DECIDED IN
THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

Vol. LVII.

SAN FRANCISCO:
BANCROFT-WHITNEY CO.
LAW PUBLISHERS AND LAW BOOKSELLERS.
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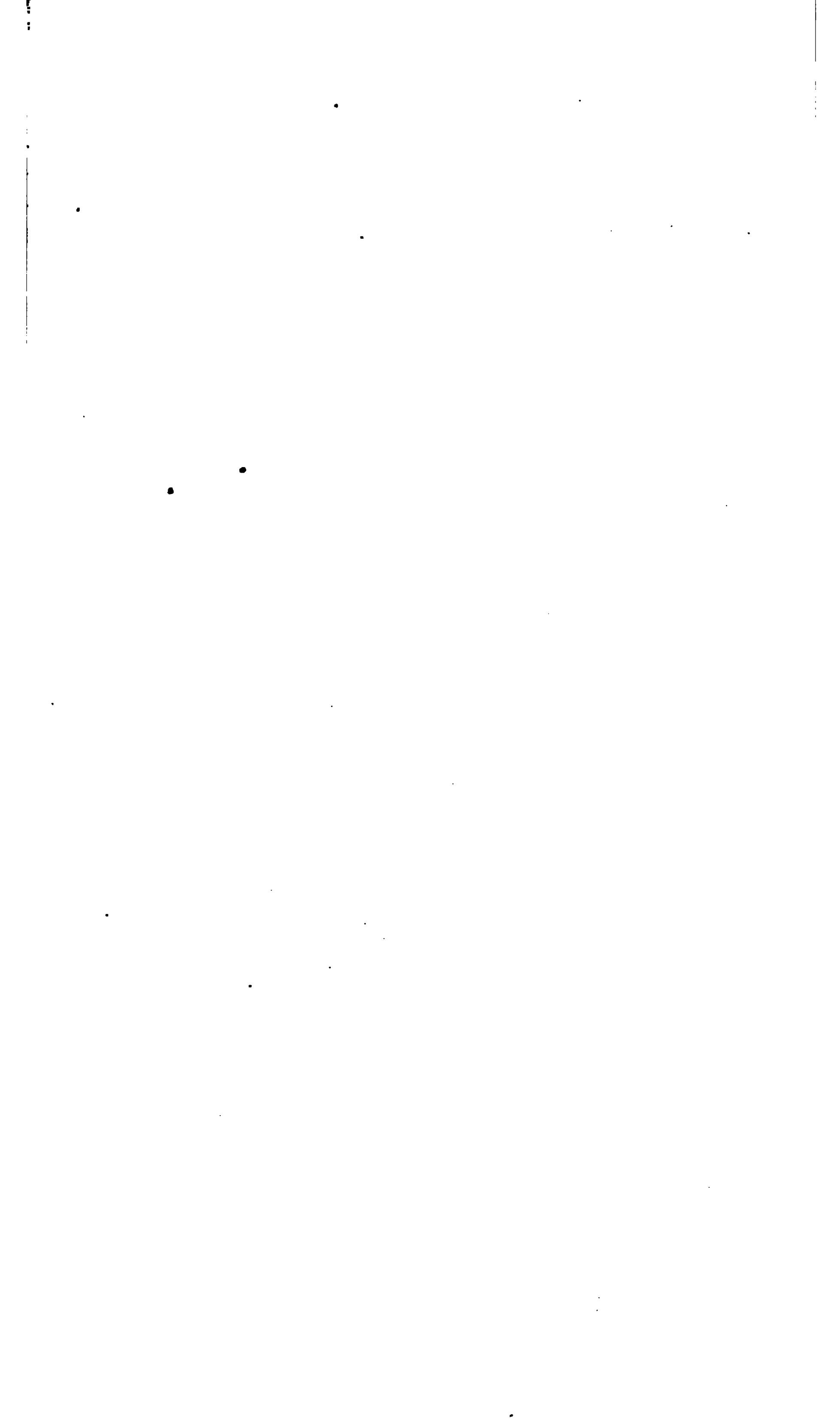
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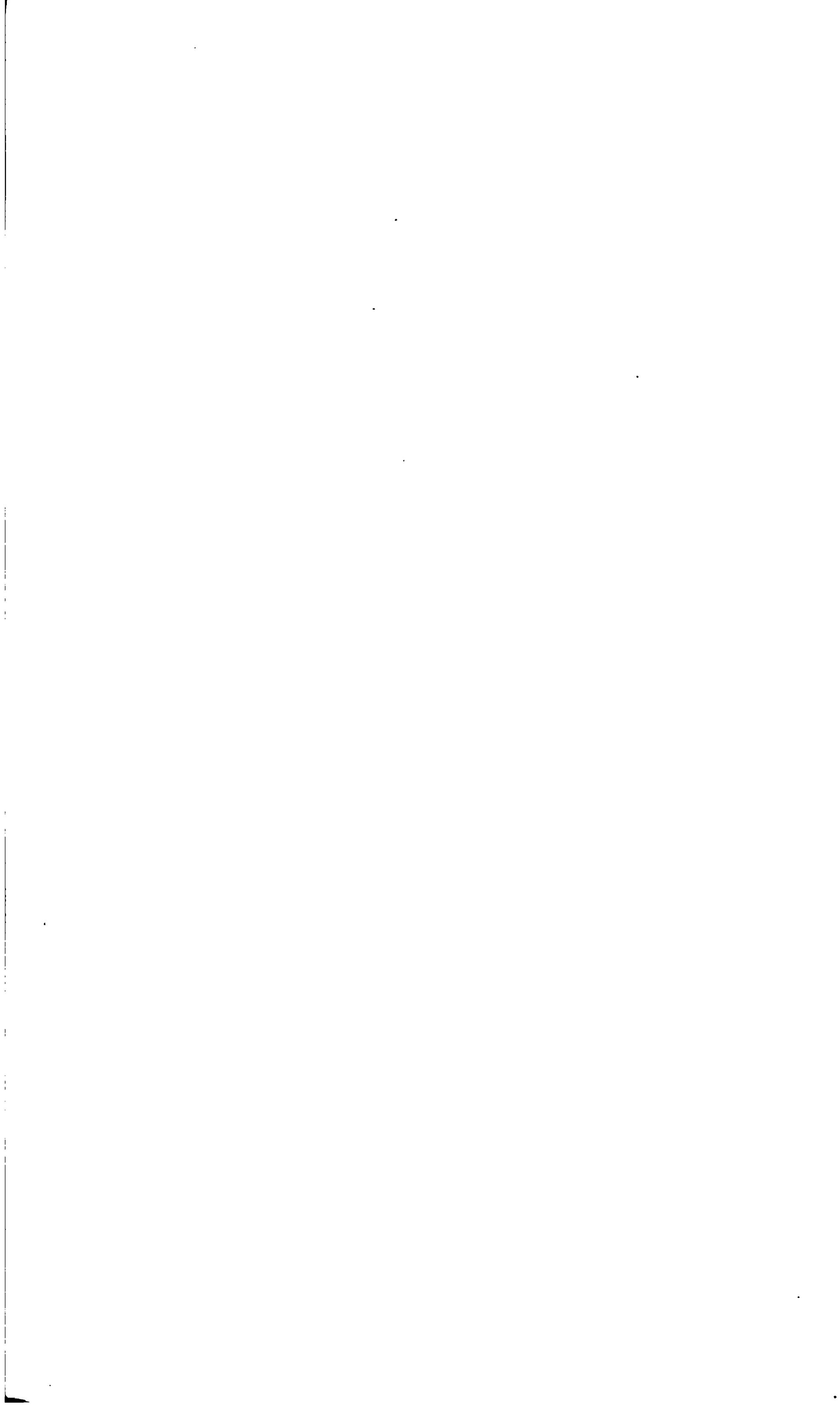
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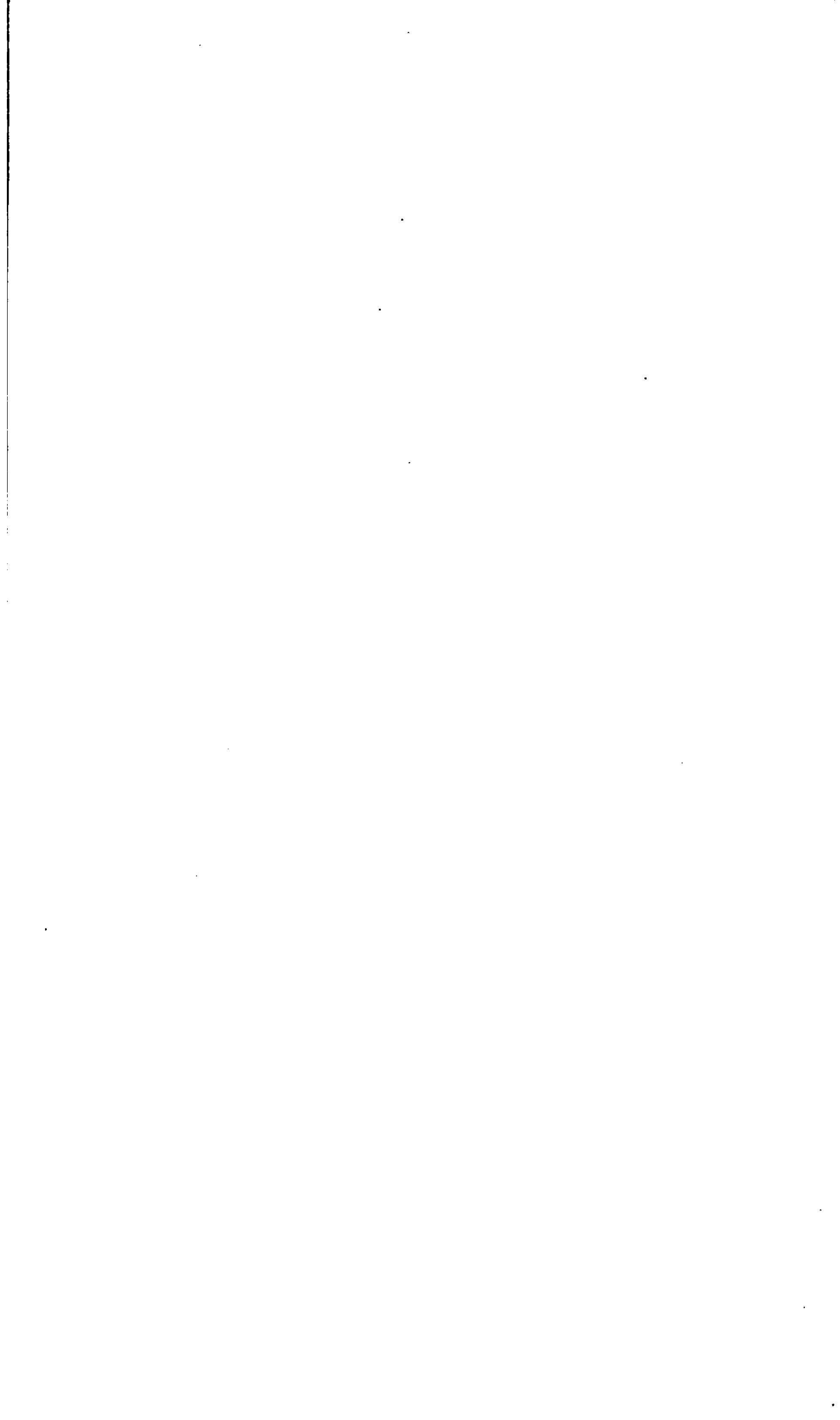
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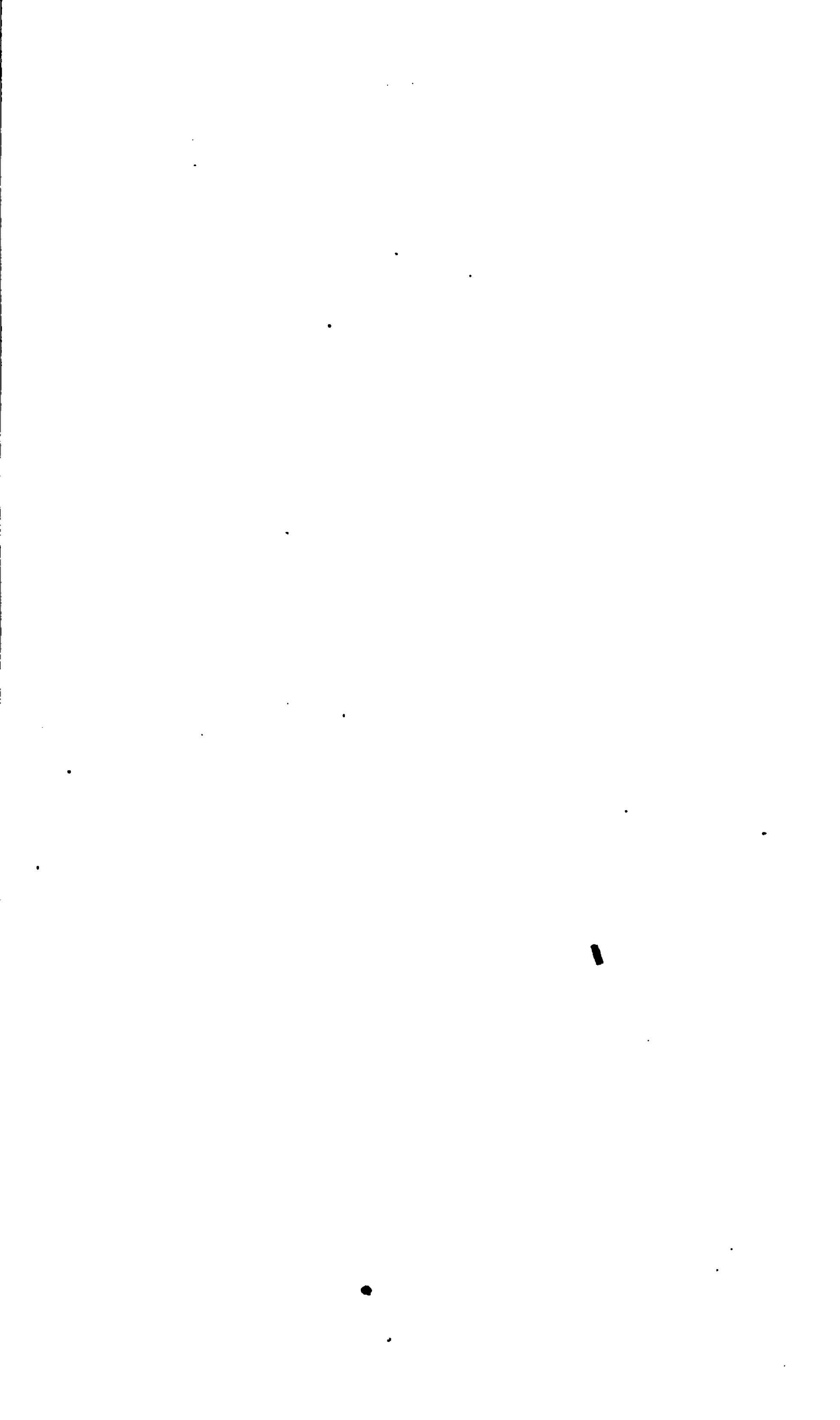
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CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

ADAMS v. CLARK.

[9 Cumming, 215.]

Consignee of Goods is not Bound to Make Tender to Carrier, who, having no legal claim on them for anything besides the freight, refuses to deliver them unless a further sum is first paid, where the consignee is ready to pay the freight. And, in an action of trover for the goods, the carrier's refusal to deliver them is evidence of a conversion.

TROVER brought to recover the value of a number of barrels of clam bait which was shipped by Thomas Donaldson from Halifax to Boston in the schooner Boston, consigned to the plaintiff. On the arrival of the vessel in Boston the bait was put in charge of the defendants, who were agents of the owners of the vessel, with instructions not to deliver the same until the freight on the goods, and also the passage of the consignor's father, who came on the vessel, were paid. The jury found for the defendants, and the plaintiff excepted. The other facts are stated in the opinion.

F. W. Sawyer, for the plaintiff.

W. Brigham, for the defendants.

By Court, METCALF, J. As the exceptions state that the plaintiff, at the trial, admitted (what is not law) that unless he had made a tender he could not maintain this action, he seems to have lost his case chiefly by his own fault or mistake; and we have had some doubts whether he is entitled to relief. But inasmuch as the exceptions, though defectively drawn up, show that the trial proceeded upon an erroneous view of the law, we have deemed it our duty to set aside the verdict.

If the defendants illegally withheld the goods from the plaintiff, he might have brought an action of *assumpsit* against them, as well as this action of trover. And in that action all that it would have been necessary for him to aver and prove would have been his readiness to pay the freight upon delivery of the goods: *Peeters v. Opic*, 2 Saund. 352, note 3; *Porter v. Rose*, 12 Johns. 209 [7 Am. Dec. 306]; *Tinney v. Ashley*, 15 Pick. 546 [26 Am. Dec. 620]. And we are of opinion that all which it was necessary for the plaintiff to prove, in order to maintain this action, was his readiness to pay freight on the goods upon their being delivered to him, and the defendants' refusal to deliver them unless something more should be first paid. There was no special contract, so far as these exceptions show, respecting the payment of freight, nor any agreement, between the consignor and the carriers, that the goods should be held to secure payment for the passage of a third party. The payment of the freight and the delivery of the goods were, therefore, concomitant acts, which neither party was obliged to perform unless the other was ready to perform the correlative act: *Tate v. Meek*, 2 Moore, 278; S. C., 8 Taunt. 280; *Yates v. Railston*, 2 Moore, 294; S. C., 8 Taunt. 293; 3 Chit. Law of Com. & Man. 417; Angell on Carriers, sec. 384.

It is said by Chancellor Kent that if the master of a vessel refuses to deliver goods for other cause than the non-payment of freight, he can not avail himself of the want of a tender: 3 Kent's Com., 7th ed., 281. The same law must apply to the owners of a vessel and to their agents.

In the present case the defendants refused to deliver the goods unless the plaintiff would pay, in addition to the freight, for the passage of the consignor's father, who came in the vessel that brought the goods. And a refusal to give up property, except on a condition which the party holding it has no right to impose, is evidence of a conversion: *Davies v. Vernon*, 6 Ad. & El., N. S., 443.

On a new trial the jury should be instructed that if the plaintiff was ready to pay freight upon having the goods delivered to him, and the defendants, having no legal claim on the goods for anything besides the freight, refused to deliver them unless a further sum should be first paid, then the plaintiff was not bound to make any tender to the defendants, and their refusal to deliver the goods was evidence of a conversion of them.

Verdict set aside, and a new trial granted.

CONVERSION, WHAT CONSTITUTES: See *Harker v. Dement*, 52 Am. Dec. 670, note 680; *Ragsdale v. Williams*, 49 Id. 406, note 408; *Clark v. Whitaker*, 43 Id. 160; *Scott v. Perkins*, Id. 470; *Zachary v. Pace*, 47 Id. 744, note 746; *Lowe v. Miller*, 46 Id. 188; *Pattie v. Gilmore*, 45 Id. 385; *Lenz v. Chambers*, 44 Id. 63; *Lee v. Matthews*, Id. 498; *Burditt v. Hunt*, 43 Id. 288, note 292, where prior cases are collected; *Hart v. Skinner*, 42 Id. 500. The refusal of a common carrier to deliver goods unless a further sum, which he has no right to charge, be first paid is evidence of a conversion: *Richardson v. Rich*, 104 Mass. 159, citing the principal case.

WHERE BAILEE REFUSES TO DELIVER GOODS, giving a different reason than that he has a lien on them for his debt, and does not mention his lien, it is evidence of conversion: *Whitlock v. Heard*, 48 Am. Dec. 73.

OWNER OF PROPERTY IS NOT BOUND TO TENDER PAYMENT, if he is ready to pay what is due upon it on delivery to him: *Stickney v. Allen*, 10 Gray, 356, citing the principal case. Where one party to a contract refuses to do what he has agreed to do, the other party need not formally offer to do what he has engaged to do; readiness to do it is all that he need allege: *Cook v. Doggett*, 2 Allen, 440; *Smith v. Boston & Me. R. R.*, 6 Id. 273; *Peebles v. Boston & A. R. R. Co.*, 112 Mass. 509, all citing the principal case.

FOSTER v. PEYSER.

[9 Cushing, 242.]

CLAUSE IN LEASE THAT OWNER SHALL NOT BE LIABLE "FOR ANY REPAIRS whatsoever on said premises during the term, the house being now in perfect order," has respect to its condition as an edifice in perfect repair, and not to the present or future state of the air within it.

IN SEALED LEASE OF HOUSE FOR PRIVATE RESIDENCE there is no implied covenant that it is reasonably fit for habitation.

DEBT for rent reserved in a lease signed and sealed by the parties. The defendant offered evidence to show that about the time he went into the occupation of the premises a noisome and filthy stench existed in the house, which rendered it disagreeable to the inmates and injurious to their health, and that this stench continued up to the time that he removed from the house. Upon his removal from the premises the defendant notified the plaintiff that he should no longer pay rent under the lease, alleging that the house had become untenantable. The other facts appear from the opinion.

F. L. Batchelder, for the plaintiff.

S. C. Maine, for the defendant.

By Court, METCALF, J. As the jury returned a verdict for the plaintiff, it must be taken as found by them that he did not know of the nuisance when he demised the house, and that he was not guilty of any fraud on the defendant.

There were two other question in the case: first, whether by the terms of the lease the plaintiff warranted that the house was reasonably fit for habitation. The court ruled that he did not; and we are of opinion that the ruling was right. The words of the lease, on which this question arises, were these: "It is understood and agreed that the owner shall not be called upon or liable for any repairs whatsoever on said premises during the term; the house being now in perfect order." It seems clear to us that this clause refers only to repairs. It states, in effect, that the house was in such a condition that no repairs would be necessary during the term of three years, unless some casualty should make them necessary. And by another provision in the lease the lessor was to bear the loss caused by casualties. The agreement that the house was "in perfect order" had respect to its condition as an edifice in perfect repair, and not to the present or future state of the air within it.

The second question was, whether there is an implied covenant, in a sealed lease of a house for private residence, that it is reasonably fit for habitation. The court refused to instruct the jury that there is any such implied covenant in such a case. And it is well settled, by authority, that there is not.

This question has been discussed in numerous recent cases in England. But it is unnecessary to refer to more than one of them, viz., *Hart v. Windsor*, 12 Mee. & W. 68, decided by the court of exchequer in 1844. In that case, Mr. Baron Parke, after reviewing all the previous cases, clearly states the law on this point, and the grounds of it. And as his views are perfectly satisfactory to us, we shall merely quote the following passages from his opinion: "It is clear that, from the word 'demise,' in a lease under seal, the law implies a covenant—in a lease not under seal, a contract—for title to the estate merely; that is, for quiet enjoyment against the lessor and all that come in under him, by title, and against all others claiming by title paramount during the term; and the word 'let,' or any equivalent words, which constitute a lease, have no doubt the same effect, but no more: *Shep. Touch.* 165, 167. There is no authority for saying that these words imply a contract for any particular estate of the property at the time of the demise; and there are many which clearly show that there is no implied contract that the property shall continue fit for the purpose for which it is demised; as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down or destroyed by fire: *Monk v. Cooper*, 2 Stra. 763;

Belfour v. Weston, 1 T. R. 310; and *Pindar v. Ainsley*, there cited; or gained upon by the sea: *Taverner's Case*, 1 Dyer, 56 a; or the occupation rendered impracticable by the king's enemies: *Paradine v. Jane*, Al. 26; or where a wharf demised was swept away by the Thames: *Carter v. Cummins*, cited in 1 Ch. Cas. 84. In all these cases, the estate of the lessor continues; and that is all the lessor impliedly warrants. It appears, therefore, to us to be clear, upon the old authorities, that there is no implied warranty on a lease of a house or of land, that it is or shall be fit for habitation or cultivation." "We are all of opinion, for these reasons, that there is no contract, still less a condition, implied by law, on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes—for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties, in every case, to protect their interests themselves by proper stipulations, and if they really mean a lease to be void, by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

The decision in the foregoing case has been recognized by the English court of common pleas, in *Surplice v. Farnsworth*, 7 Man. & G. 576; by the supreme court of New York, in *Cleves v. Willoughby*, 7 Hill, 83; and is referred to as the settled law in Addison on Con. 412; Archb. Land. & Ten. 67, 158; and 1 Platt on Leases, 613.

In the cases which were cited for the defendant (except two or three *nisi prius* decisions, which are virtually if not directly overruled by *Hart v. Windsor*, 12 Mee. & W. 68), in which tenants have been allowed to withdraw themselves from the tenancy, and to refuse payment of rent, there was either fraudulent or erroneous description of the demised premises, or they became uninhabitable by the wrongful act or omission of the lessor.

Judgment for the plaintiff.

THERE IS NO COVENANT IMPLIED BY LAW that premises leased are or shall remain in condition suitable to be occupied for the purpose for which they are demised: *Welles v. Castles*, 3 Gray, 328; *Leavitt v. Fletcher*, 10 Allen, 121; *Royce v. Guggenheim*, 106 Mass. 202, all citing the principal case.

COVENANTS TO REPAIR: See *Beach v. Crain*, 49 Am. Dec. 369, note 374, where this subject is considered.

"A LEASE DOES NOT IMPLY ANY PARTICULAR STATE OF THE PROPERTY LET, or that it shall continue fit for the purposes for which it is let; unless otherwise stipulated, the tenant takes the premises as they are, and must pay the rent for the term. But this rule applies only to premises which, by the terms of the lease, have passed out of the control of the landlord into the exclusive possession of the tenant. Where a portion of a building is let, and the tenant has rights of passage-way over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control, and which he is bound to keep in repair; as to such portions he still retains the responsibilities of a general owner to all persons, including the tenants of his building;" *Looney v. McLean*, 129 Mass. 35, citing the principal case.

DUTTON v. WOODMAN.

[*9 CUSHING*, 255.]

WHERE QUESTION BEFORE JURY IS WHETHER B. IS LIABLE AS PARTNER on a note signed by B. & Co., evidence that A.'s credit was bad until he commenced business under the firm name of A. & Co. is entirely irrelevant.

EVIDENCE ADMISSIBLE ONLY ON ASSUMPTION OF EXISTENCE OF COPARTNERSHIP is clearly incompetent when offered for the purpose of proving the existence of the partnership.

ON RE-EXAMINATION OF WITNESS, HE CAN NOT BE QUESTIONED in reference to matters not inquired into on his cross-examination.

FORMER JUDGMENT BETWEEN SAME PARTIES IS ADMISSIBLE IN EVIDENCE in an action pending between them, if it appears that the fact sought to be proved by the record was actually passed upon by the jury in finding their verdict in the former suit. Hence, where the fact sought to be proved is that A. and B. were copartners under the firm name of A. & Co. at the time when the note in suit was given in the name of that firm, a former judgment obtained by the same plaintiffs, against A. and B. on a note executed at the same time with the note in suit, and in the same firm name, is admissible, though not conclusive, evidence.

ALL ADMISSIONS ARISING OR FAIRLY TO BE INFERRRED FROM ACQUIESCEANCE of a party are competent evidence. Therefore, in a suit against A. and B. as copartners, under the firm name of A. & Co., on a note signed in the firm name, a letter written by the purchasing agent of the firm to B., informing him that A. had stated to the writer that a copartnership had been formed between A. and B., and that he wrote to ascertain whether B. was really responsible for goods bought for the firm's store, stating that the proceeding was rendered necessary from the fact that a credit was then needed to carry on the business successfully, and adding that he wrote the letter with the knowledge of A., is competent evidence to be submitted to the jury in connection with other evidence to prove the copartnership, although the letter was never answered by B., where

after the letter was written the writer had a conversation with B. in reference to it, in which he again asked B. if he was a partner in the firm of A. & Co., and B. said he would neither admit nor deny it. But without this subsequent conversation the letter would not have been admissible.

Assumption. The letter referred to in the opinion is as follows: "I learn from your brother, I. F., that you have formed a copartnership with him, and contemplate coming to this city to assume an active part in the concern. As there has been no public announcement made to that effect, and as you are not here, I have written to ascertain if you consider yourself really responsible as one of the partners for the payment of the goods bought for this store. This proceeding is rendered necessary from the fact that you will need, or at least do need now, a credit, in order to carry on the business successfully. I write this with the knowledge of your brother, feeling that it is for the interest of this concern to know whether you wish to be considered as a partner, and are willing to assume the responsibilities as such." The other facts appear from the opinion.

J. A. Loring, for the plaintiffs.

H. Jewell, for the defendant E. W. Woodman.

By Court, BIGELOW, J. This is an action of *assumpsit* to recover the amount of a promissory note dated October 26, 1848, signed "I. F. Woodman & Company." The plaintiffs claimed to recover against I. F. Woodman and E. W. Woodman, the two defendants, upon the ground that they were copartners in business at the time the note was given, under the firm of I. F. Woodman & Co. No service was made on I. F. W., and the only question tried before the jury was, whether, at the time aforesaid, E. W. Woodman was a copartner, and so liable on the note. Various exceptions were taken to the rulings of the judge at the trial, all of which relate to the competency of evidence.

1. The plaintiffs sought to prove that in the summer of 1848, and until I. F. Woodman commenced business under the firm of I. F. Woodman & Co., his credit in the market was bad. This testimony was rejected by the judge, and we think rightly; because it had no tendency to prove the issue before the jury, and was entirely irrelevant. The credit of I. F. Woodman had no bearing on the question of the liability of E. W. Woodman as a copartner.

2. The judge also rightly rejected all the statements made

by the witness Thurston to the plaintiffs, as to the connection of E. W. Woodman with I. F. Woodman; and all inquiries made by the plaintiffs of Thurston, as to the credit of said firm and the persons of whom it was composed; and also all the statements made by I. F. Woodman to Thurston, and by him repeated to the plaintiffs; because no proper foundation was laid to render such evidence admissible as against E. W. Woodman. The authority of Thurston and of I. F. Woodman to bind E. W. Woodman by their statements and declarations depended entirely upon the existence of the copartnership. Until that was proved, E. W. Woodman was not shown to have had any connection with either of them; and as that was the very point in controversy before the jury, to be determined by their verdict, evidence which could be admissible only upon the assumption of the existence of the copartnership was clearly incompetent, when offered to prove the fact upon which its competency depended: 1 Greenl. Ev., sec. 177; Collyer on Part. 454; *Tuttle v. Cooper*, 5 Pick. 414; *Robbins v. Willard*, 6 Id. 464.

3. So, too, the question put by the plaintiffs to their witness Thurston, upon his re-examination, in relation to a conversation between him and I. F. Woodman, was properly excluded, because it does not appear that any such conversation was inquired into by the defendants on cross-examination.

4. The next exception is founded on the refusal of the judge to admit in evidence a former judgment between the same parties, in which the plaintiffs recovered against the same defendants, as copartners, upon a promissory note signed I. F. Woodman & Co., bearing date December 2, 1848. We consider the rule well settled in this commonwealth, that to render a former judgment between the same parties admissible in evidence, in another action pending between them, it must appear that the fact sought to be proved by the record was actually passed upon by the jury in finding their verdict in the former suit. It is not necessary that it should have been directly and specifically put in issue by the pleadings, but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled in the suit in which the former judgment is offered in evidence. And parol evidence is admissible to show that the same fact was submitted to and passed upon by the jury in the former action; because, in many cases, the record is so general in its character that it could not be known without the aid of such proof what the precise

matter in controversy was at the trial of the former action: *Standish v. Parker*, 2 Pick. 20 [13 Am. Dec. 393]; *Parker v. Standish*, 3 Id. 288; *Parker v. Thompson*, Id. 429; *Spooner v. Davis*, 7 Id. 147; *Eastman v. Cooper*, 15 Id. 276, 280 [26 Am. Dec. 600]. Applying these well-settled principles to the case at bar, it will be found that the judgment offered in evidence by the plaintiffs falls clearly within them, and ought not to have been excluded by the judge. The fact which the plaintiffs sought to prove was that a copartnership existed between I. F. Woodman and E. W. Woodman, under the name of I. F. Woodman & Co., in December, 1848, at the time the note in suit was given. This was the very fact in dispute between the parties at the trial. The judgment, which was offered in proof of this fact by the plaintiffs, was recovered by them against the same defendants, doing business under the same firm as copartners, and upon a note of hand, which they offered to show was given at the same time with the note in suit. The fact of copartnership in December, 1848, was the fact to be proved. It was essential to the finding of the former verdict, without proof of which it could not have been recovered. It is therefore admissible in evidence, though not conclusive, when the same question is again to be tried between the same parties. The principles laid down and illustrated in *Eastman v. Cooper*, *ubi supra*, are decisive of this point, and render further argument and authority unnecessary.

5. The remaining exception is founded on the rejection of a letter offered in evidence by the plaintiffs, written by Thurston, the agent of I. F. Woodman & Co., to the defendant, E. W. Woodman. We think it very clear that this letter would have been incompetent to affect E. W. Woodman, were it not for the conversation respecting it between him and Thurston in Boston, which was proved by the plaintiffs. There is a marked distinction between acquiescence in the verbal statement of others and the omission to answer letters written to a party by third persons: *Commonwealth v. Eastman*, 1 Cush. 189, 215 [48 Am. Dec. 596]. The former renders the statements admissible, while the latter does not make the letters competent evidence. But upon a consideration of the subject-matter of this letter, the circumstances under which it was written, as stated by E. W. Woodman, the information which it conveyed to him, that his name and credit were being used in the firm of I. F. Woodman & Co., the direct application which it contains to him to give a reply, together with the subsequent conversation with Thurston in

regard to the letter and its contents, accompanied by a refusal on the part of the defendant to admit or deny the fact of his copartnership with I. F. Woodman, we are of the opinion that it does not come within the rule excluding letters which a party has omitted to answer, and that it was competent evidence to be submitted to the jury, in connection with the other testimony relating to it. It falls within the rule which renders competent all admissions arising or fairly to be inferred from the acquiescence of a party.

Exceptions sustained.

POWER OF PARTNER TO BIND COPARTNER BY NOTE IN FIRM NAME: See *Hamilton v. Summers*, 54 Am. Dec. 509, note 513, where other cases are collected.

DECLARATIONS OF PARTY AS TO PARTNERSHIP, WHEN ADMISSIBLE in evidence against him: See *Hamilton v. Summers*, 54 Am. Dec. 509, note 513, and cases there collected.

DECLARATIONS OF ALLEGED PARTNER ARE NOT ADMISSIBLE as against other parties to prove the existence of the partnership: *Robins v. Warde*, 111 Mass. 245; *Smith v. Hulett*, 65 Ill. 497, both citing the principal case.

ON RE-EXAMINATION OF WITNESS AFTER CROSS-EXAMINATION he may be examined, in the discretion of the judge, on new matters: *Clark v. Force*, 30 Am. Dec. 53.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW WHAT WAS DECIDED by the jury in a former suit: *McDowell v. Langdon*, 3 Gray, 513; *Sawyer v. Woodbury*, 7 Id. 503; *Perkins v. Packer*, 10 Allen, 24; *Barry v. Adams*, 14 Id. 210; *Burlew v. Shannon*, 99 Mass. 204; *Littlefield v. Huntress*, 106 Id. 126; *Merritt v. Morse*, 108 Id. 275; *White v. Chase*, 128 Id. 158; *Washington, A. & G. S. P. Co. v. Sickles*, 24 How. 342, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Fearing v. Kimball*, 4 Allen, 127, to the point that the introduction of the letter of the party offering it was admissible wholly on the ground that it was rendered admissible by the subsequent verbal statements of the other party as to the matter contained in it, and the reason why he did not answer it.

GOULD v. NORFOLK LEAD COMPANY.

[9 CUSHING, 338.]

AGENT ACTING UNDER PAROL AUTHORITY IS COMPETENT WITNESS to prove his own agency.

WHERE AGENT OF CORPORATION IS CALLED AS WITNESS TO PROVE that he had paid numerous drafts on the company not previously accepted by it, if the drafts so paid may be presumed to be still in existence, they must be presumed to be in the company's possession, and notice to produce them must be given to it, before the testimony of the agent can be received.

PAYMENT OF UNACCEPTED DRAFTS ON CORPORATION, BY ITS AGENT, is not evidence of his authority to accept drafts upon it. The authority to pay drafts applies only to that specific class of transactions, and there can not be implied from it an authority to agree to pay at a future day.

EVIDENCE THAT PERSON IS GENERAL AGENT OF CORPORATION has but little tendency to show that he has authority to accept drafts for it.

VOTE OF DIRECTORS OF CORPORATION IN WRITTEN INSTRUMENT, and must be construed by its terms alone, with reference to the subject-matter to which it applies; and parol testimony is not admissible for the purpose of showing the sense in which a director understood it.

WHERE AUDITOR IS APPOINTED TO STATE ACCOUNT BETWEEN DRAWER OF DRAFT sued on and the corporation whose agent accepted it payable "when in funds," after a certain other draft was paid, his report that the corporation "were in funds" is a statement of a fact within the province of the auditor to make, and is *prima facie* evidence of the fact.

WITNESS MAY BE DISCREDITED BY EVIDENCE THAT HE HAS MADE DIFFERENT STATEMENT on a former occasion, although the precise words used on that occasion can not be proved; nor need he be first asked whether he has ever testified differently. But the previous statement can not be used to prove the fact to be as then stated by him.

Assumpsit on a draft drawn by S. Albert Cox, and alleged to have been accepted by the defendants. The acceptance was in the following words: "Accepted, to pay when in funds, after paying draft in favor of Fulton Iron Foundry, heretofore accepted. For Norfolk Lead Co. N. Adams, Agent." The defendants pleaded the general issue, and denied—1. That Adams had authority to make such acceptance; and, 2. That the defendants were ever in funds to pay the acceptance according to the tenor thereof. The jury returned a verdict for the plaintiffs. The other facts are stated in the opinion.

J. P. Healy, for the plaintiffs.

L. Mason and R. Choate, for the defendants.

By Court, SHAW, C. J. This was an action of *assumpsit* to recover the amount of a draft alleged to have been accepted by the defendants.

The suit was brought May 15, 1848, and was resisted on the grounds that Adams had no authority to accept the draft so as to bind the corporation; and secondly, that the acceptance was conditional, and the corporation had not received funds to pay the acceptance, according to its tenor. Inasmuch as it became necessary to ascertain the state of Cox's accounts with the defendants, the account was referred to an auditor, whose report is a part of the case. It comes before the court on various exceptions, taken by the defendants.

1. At the trial in the court of common pleas, the plaintiff offered Adams as a witness, to prove that he was an agent of the corporation, and as such, authorized to accept the draft in question; to which the defendants objected. The court, however, overruled the objection, and permitted him to testify to his agency and authority. This, we think, was according to the rule that an agent, acting under a parol authority, is competent to prove his own agency by his testimony; a rule founded on convenience and necessity, and supported by general usage, and it does not come within any of the exceptions to the rule.

2. The agent testified that he had paid, as agent of the company, numerous drafts and orders drawn on them, and not previously accepted by them. This evidence was objected to, because it was attempting to prove the contents of written instruments without showing their loss or giving notice to the defendants to produce them; and because the payments of such drafts had no tendency to prove authority to accept drafts. The court overruled these objections, and instructed the jury that the payment of a draft not accepted included its acceptance, and therefore was evidence of an authority to accept drafts.

As to the first part of the objection, it is obvious that, if the drafts were thus paid, they were paid by the corporation, and for their account. A corporation must act by and through agents, directors, or trustees, because it can act in no other way. Perhaps the presumption is that these drafts, having been so paid, were canceled or destroyed; but if otherwise, and if they may be presumed still to exist, it is to be presumed that they are held by the company, and could be produced by them, and so notice to produce should have been first given. If the case depended upon this point, we should say sufficient notice for this purpose might have been given at the trial; and, in a new trial, a very short notice would probably be deemed sufficient.

3. The second branch of this objection is entitled to more consideration. The instruction of the court, that the payment of a draft not accepted included its acceptance, and was evidence of an authority to accept drafts upon the company, was in our opinion incorrect in point of law. The acceptance of a draft is an executory undertaking to pay it at a future day, and the authority to make such an agreement is not incident even to the authority of an agent to purchase and pay for goods. The authority to accept is one of a very high character, particularly in a case of a trading corporation, to whose business credit, and the use of that credit, is constantly necessary. It has been

argued that such authority may be inferred from the course of trade, and the payment of unaccepted drafts upon the company, on other occasions. But this implication does not follow from such payments; for, either the agent had funds of the company for the purpose of paying such drafts, which does not imply that he had authority to pledge their credit, or he paid them from his own funds, relying on the credit of the company, and their previous undertaking and liability to reimburse him for all his advances, which implies no authority whatever to bind them to a future payment of money, by an acceptance. I shall not go into an examination of the cases on this subject, but will refer to that of *Webber v. Williams College*, 23 Pick, 302, where the question was much considered, and many cases were cited.

The case of *Emerson v. The Providence Hat Mfg. Co.*, 12 Mass. 237 [7 Am. Dec. 66], goes to the point that constituting one a buying and selling agent of a trading company does not imply authority in him to give the negotiable note of the company.

In the case before us, the agent, by accepting the draft, bound the corporation, if he bound them at all, to account with another person than Cox, which might be very injurious to them, as it would exclude them from setting off what might be due to them from him. The authority to pay drafts applies only to that specific class of transactions, and therefore, there can be implied from it no authority to agree to pay at a future day. If Adams paid the drafts from his own funds, he did so relying on his own authority, as agent, to that extent to reimburse himself, or on the subsequent ratification of his acts by the company, as otherwise he was without remedy; for no man can make himself the creditor of another without his consent, express or implied. Without such consent he pays in his own wrong.

4. The next point is, that the plaintiffs' counsel was permitted to argue, from the fact that the agent had made a contract with Cox for building certain machinery for the defendants, that he was authorized to pledge the credit of the company by his acceptances. We think the evidence had some tendency to prove that he was a general agent of the defendants, and in that respect was competent, though certainly it was very remote. The name of general agent might imply that he had authority to purchase materials for carrying on the defendants' business, but it had little tendency to show authority to accept drafts for them.

5. The defendants then put in a vote of the directors of the corporation that the proposition of Mr. Cox for building ma-

chinery be referred to Mr. Adams, and put in also a written proposition, made by Cox, which was different from the terms of the contract afterwards executed between him and the defendants; and the defendants' counsel asked the court to rule that this vote was a sufficient authority to Adams to make and execute the contract which was finally made, and therefore, had some tendency to show an authority in Adams to pledge the defendants' credit. But the court, on the other hand, ruled that the vote of the directors merely authorized Adams to consider and report upon the proposition, and not to make a contract. The defendants then asked leave to prove by the directors, who had sold and transferred their stock in the company, that they understood the vote to confer upon Mr. Adams full authority to make and execute the contract. This the court refused to do, because the vote was in writing. This, we think, was correct, because the vote was a written instrument, and must be construed by its terms alone, with reference to the subject-matter to which it applies. If the terms of the vote imported the authority to make the contract, no parol testimony was necessary; if it did not, such testimony could not be competent to control and vary those terms.

6. The defendants' counsel objected to the auditor's report, because it stated that "the defendants were in funds," and requested the court to rule that it was not competent for the auditor to pass upon that question, and that that part of the report which contained such statement should be stricken out; but the court ruled that it was within the province of the auditor to pass upon that question, and that the report was *prima facie* evidence of the facts within his province to inquire into.

Now what does this objection apply to? The objection is, that the auditor expresses an opinion upon a question of law, a question which it is for the jury to pass upon; but in looking at the report we find it is not open to that objection. The auditor was appointed to state the account between Cox and the defendants, to see what money he had earned under his contract with the defendants, and what money of his was in their hands to answer his drafts upon them; to see if the balance in their hands, after deducting a sufficient sum to pay the Fulton Iron Foundry, was sufficient to pay this draft of the plaintiffs. He found that the balance was sufficient, and reported, in the language of the acceptance, that they were in funds; that is, in the condition indicated by the acceptance as that in which their liability to the plaintiffs should take effect. This result depended

upon the state of the accounts between the parties, and was a matter of fact, not the expression of an opinion. It was not an independent substantive statement of fact, but the result of the inquiry which he was directed to make into the state of the accounts, and so was within his province. The items of the account from which this result was drawn were submitted at the same time for the examination of all parties, by which the correctness of such result could be readily tested.

7. Edward Crane, one of the directors of the company, was a witness introduced at the hearing before the auditor, and at the trial in court, by the defendants, and Charles E. Parsons was called by the plaintiffs, and testified, at the trial, that Crane had testified concerning the same subject-matter, on another occasion, in a certain trial between other parties; and he stated substantially what his testimony then was. The defendants' counsel objected to the admissibility of this testimony, because the witness could not state the precise words used by Crane on that occasion, and because the plaintiffs' counsel had not interrogated Crane, while upon the stand, as to whether he had ever testified differently from what he then testified. These objections the court overruled, and we think very properly. This point of practice is well settled, and the ruling conforms entirely to the practice in this commonwealth. Evidence respecting the testimony of a deceased witness, to which the counsel taking this exception manifestly referred, stands upon quite other grounds. If it is practicable to show the precise words of the deceased person, so as to give his own testimony exactly, then it is competent, otherwise not: 1 Greenl. Ev., secs. 163, 165. But the present case depends on an entirely distinct rule. It is substantially an impeachment of the credibility of the witness. It can not be used to prove the facts to be as stated by the witness on the previous occasion; but merely to show that he then gave a different account of the same transaction. This affects the value of his testimony. It shows he has made a statement conflicting with the one he gives at the trial. If under oath on the prior occasion, the evidence against his credibility is so much the stronger, but it is not necessary that he should have been sworn. The fact that he has stated the facts differently shows either a failure of memory, that he has forgotten what he once knew, or else it shows a want of integrity, and either way it impairs the value of his testimony. But it is no evidence whatever that the facts are as he formerly stated; and though appeals are sometimes made to a jury that it is so,

it is the province of the court to inform them that it is not so. As to requiring a witness to be asked, while testifying in chief, whether he has ever made a different statement, as a basis for afterwards contradicting him, that is the English rule, but we have always adopted a different rule. After it has been shown, however, that the witness has made conflicting statements, he may be recalled for the purpose of explaining or reconciling them.

These are all the grounds necessary to be considered. The verdict must be set aside, and a new trial had in this court.

Exceptions sustained.

AGENT'S AUTHORITY CAN NOT BE ESTABLISHED BY HIS OWN DECLARATIONS:
See *Harker v. Dement*, 52 Am. Dec. 670.

ADMISSIONS OF AGENT AS EVIDENCE AGAINST HIS PRINCIPAL: See note to *Moore v. Bettis*, 53 Am. Dec. 773, where this subject is discussed at length.

EVIDENCE THAT GENERAL AGENT PREVIOUSLY PAID DRAFTS drawn on his principal does not establish the fact of the agent's authority to accept a draft so drawn: *Munroe v. Holmes*, 5 Allen, 203, citing the principal case.

AUDITOR MAY REPORT WHETHER ACCEPTOR OF DRAFT sued on was in funds or not at a particular time: *Corbett v. Greenlaw*, 117 Mass. 174, citing the principal case.

IMPEACHING WITNESS BY PROOF OF CONTRADICTORY STATEMENTS: See *Moore v. Bettis*, 53 Am. Dec. 771; *State v. George*, 49 Id. 392, note 396; *Sealy v. State*, 44 Id. 641, note 649, where other cases are collected. A witness may be discredited by proving that he has made different statements at other times, without asking him if he made such contradictory statements: *Day v. Stickney*, 14 Allen, 260; *Ryerson v. Abington*, 102 Mass. 531; *Blake v. Stoddard*, 107 Id. 112, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Blackmer v. Davis*, 128 Mass. 541, to the point that it can not be shown by extrinsic parol evidence how a contract, when made, was understood by the parties.

PHELPS v. BREWER.

[9 CUSHING, 390.]

WHERE PARTY IS NOT WITHIN JURISDICTION OF COURT AND IS NOT SERVED with process, or does not voluntarily appear and answer to the suit, by himself or his attorney, the judgment can not be enforced against him out of the local jurisdiction.

ATTORNEY'S ENTRY OF HIS GENERAL APPEARANCE FOR DEFENDANT, in an action against a partnership, is to be construed as an appearance for the partners as partners, and not as an appearance for the partners individually, severally, and personally, so as to make a judgment against the partnership in that action binding on an individual partner in another jurisdiction, by whom the appearance was not authorized.

IN SUIT AGAINST PARTNERSHIP, PARTNER NOT SERVED with process, and not within the jurisdiction of the court, is not bound by the judgment, even though the statute of the state where it is rendered provides that service upon the partner within the state shall be sufficient. The statute of a state can not give its courts jurisdiction over persons not within its limits nor subject to its laws.

PARTNER HAS NO IMPLIED POWER TO ENTER APPEARANCE in a suit, except for the partnership.

DEBT. The suit in equity referred to in the opinion was a suit brought in the supreme court of Connecticut by Hugh R. Kendall against these plaintiffs and defendants to foreclose a mortgage given to him by the New England Carpet Company. By the decree in that suit it was ordered and decreed that, unless the debts due to Kendall under his mortgage should be paid within a certain time, either by the plaintiffs or defendants in this suit, they should be forever barred and foreclosed of all equity of redemption in the property mortgaged. The other facts appear from the opinion.

W. Sohier, for the plaintiffs.

J. P. Putnam, for the defendant Brewer.

By Court, FLETCHER, J. This is an action of debt, founded on two alleged judgments, purporting to have been rendered in the county court of the county of Hartford and state of Connecticut, in favor of the plaintiffs, against the defendant Brewer, and one Elbridge G. Roberts, of the city and state of New York, and Charles L. Roberts, of Simsbury, in the said state of Connecticut. The writ also contains counts upon a note and an account which were the original causes of action upon which said judgments were rendered. The case is submitted to the court on an agreed statement of facts.

The present suit proceeds against Brewer alone, and the defense is made by him alone, the process not having been served on the other persons named in the judgments. The judgments were rendered in March, 1840. By the original writs in the cases in which said judgments were rendered, it appears that the defendant and Charles L. Roberts and Elbridge G. Roberts were declared against as partners, under the name and firm of the New England Carpet Company; but by the return of the officer, it appears that service was made upon Charles L. Roberts only, and not upon the defendant nor the said Elbridge G. Roberts, who were neither of them even inhabitants of or residents in said state of Connecticut. The defendant Brewer

was an inhabitant and resident of Massachusetts, and E. G. Roberts was an inhabitant and resident of the city of New York, and Charles L. Roberts was an inhabitant and resident of the state of Connecticut, and was the managing partner; and all the partners signed and published a notice that he was the general agent of the firm.

The writs in the suits in which the judgments were rendered were served on Charles L. Roberts, but were not served on this defendant, Brewer, nor on E. G. Roberts; but it is not necessary to refer to the latter, as this suit is against Brewer alone.

Upon the entry of the suits in the county court of Connecticut, the initials of Thomas C. Perkins, an attorney at law, were entered upon the writ and docket, to indicate that he appeared for the defendants in the mode in which it was usual to enter the appearance of attorneys for parties. What is the legal effect of such an appearance upon the defendant Brewer? is one of the questions raised and discussed in the present case. The appearance of the attorney Perkins was thus entered, upon the application of Charles L. Roberts, who was an inhabitant of Connecticut, and had been duly served with process. Perkins testified that he had no communication with Brewer in regard to the suit, and had no authority from him to appear for him. The records of the cases, as extended, did not show any appearance.

It is maintained on the part of the defendant Brewer, that these judgments can not be enforced against him in this commonwealth, for the reason that the court rendering the judgments had no jurisdiction over him; because, as he says, he was not within their jurisdiction, was not served with process, did not appear or authorize any one to appear for him, and therefore, that these judgments have no force against him in this commonwealth. This presents the first and principal question in the present case.

For the plaintiffs it is insisted, in the first place, that the records of the judgments of the court in Connecticut are conclusive.

But it is a matter now too well settled to admit of discussion, that when a party is not within the jurisdiction of the court, and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment can not be enforced against him out of the local jurisdiction. This point has been fully and repeatedly decided by this court, and since the institution of this suit has been directly adjudged

by the supreme court of the United States: *D'Arcy v. Ketchum*, 11 How. 165.

That case is in principle precisely like the present, and fully sustains the position taken in behalf of the defendants.

Next, it is said for the plaintiffs that the record of the appearance in the suits in Connecticut is conclusive to bind the defendant Brewer. As it appears by the records that Brewer was not served with process, he can not therefore be bound by the judgments, unless he is bound by the appearance.

The records, as extended, do not show any appearance. But suppose it to be competent to prove, by the initials of the attorney entered on the writs and docket, and other testimony distinct from the records, that the attorney Thomas C. Perkins intended to enter a general appearance, still it would amount to nothing more than a general appearance for the partners as partners, and for the purpose of defending the action against the partnership, and it would not be construed to be an appearance for the partners individually, severally, and personally, or for any other purpose than to defend that suit against the partnership. An appearance might be entered to prevent any judgment against the partners as partners, or to prevent any levy on partnership property, or on funds in the hands of trustees, or to defend against proceedings in the nature of proceedings *in rem* against partnership property, or for other similar purposes. That is, the appearance might be to protect rights and interests of the partnership, so far as involved in those suits, and so far as the court had jurisdiction over such rights and interests; but not to bind the persons or property of the individual partners, except so far as they were necessarily bound in those suits. There is nothing in the case to show any appearance for this defendant so as to render the judgments binding upon him individually in this commonwealth.

It is further insisted on, in behalf of the plaintiffs, that it appears by the statute of Connecticut that the service on Roberts was sufficient by the *lex loci*, and that the courts of Massachusetts should uphold that jurisdiction, unless contrary to natural justice.

But the statute of Connecticut could not give its courts jurisdiction over persons not within its limits, and not subject to its laws. Property found in that state may be liable to be taken upon a judgment rendered upon such a service. So in this commonwealth an attachment of property found here, of a person not within this commonwealth, may be followed up by a

judgment and execution, and the property taken in satisfaction. But in such case the property only can be made subject to the jurisdiction so as to render the judgment binding as a proceeding *in rem*, but it would not be allowed to operate *in personam* in the courts of other states.

A statute of New York provides that a judgment may be rendered against several joint debtors, when one only is brought into court on process. Yet it was decided by the supreme court of the United States, in the case of *D'Arcy v. Ketchum*, before referred to, that where a judgment was given in New York against two partners, one of whom resided in Louisiana, and was never served with process, an action could not be maintained on that judgment in Louisiana, against the partner residing in that state.

Where there are so many distinct jurisdictions, and so many individuals living in one state, having business or transactions in another or other states, it would be most dangerous to hold a man bound by a judgment in a suit where no process had been served on him, and where he was not within the jurisdiction of the court.

Another ground taken by the counsel for the plaintiffs is, that if the appearance of Thomas C. Perkins, the attorney, was entered in pursuance of a request of C. L. Roberts, as a general appearance, that Roberts, either by force of his general power as a partner, or as the agent and managing partner, of which public notice was given, had authority to make an appearance generally for the defendants; and that so it was an appearance for Brewer, one of the partners, so that the judgments bind him individually and severally, and that the present action, therefore, upon them may be maintained against them.

There is much discussion in the books, and some conflict of decisions, as to the power of one partner to enter an appearance for his copartners in suits at law, or to bind them by submission to arbitration, or to confess judgment for them. But it is not necessary to go into a consideration of the authorities on these subjects, or to endeavor to ascertain what, upon the whole, is the established doctrine in regard to these several points.

The merits of this case would not be at all affected by assuming that Charles L. Roberts had authority, either by virtue of his general authority as partner or by the authority conferred on him as the agent of the firm, to enter an appearance in the suits in Connecticut, to defend the rights and property of the partnership, so far as they were involved in those suits. It

would not come at all within the scope and purpose of such authority to enter an appearance for this defendant Brewer, for another and distinct purpose and object, so as to give the court a jurisdiction over him individually, which they otherwise would not have, and thus give their judgments a greater force and effect against this defendant personally than they would have without such appearance. No such authority would be implied as necessary for the interests of the firm, and still less as necessary for the interests of the individual partners.

Supposing, therefore, that the appearance of Perkins was general, and supposing, also—a fact which is not shown by his testimony—that he intended to enter a general appearance, it is clear that he had no authority from Brewer, the defendant, personally, but acted by the request of Roberts alone; and therefore the appearance must be regarded as such a one as Roberts had power to make for the firm or partnership only, and to defend their partnership property and rights, and not to bind the individuals who were not within the jurisdiction and had not been served with process.

The court having come to the conclusion that, even during the continuance of the partnership, Roberts had no right to enter an appearance for Brewer individually, so as to give the court jurisdiction over him personally and individually, it is not necessary to determine whether or not the partnership was dissolved.

It was said by the counsel for the plaintiffs, that, though the defendant was not served with process in the suits in Connecticut, yet that he had, in some way, knowledge of the pendency of the suits, and was within the limits of that state at some time while the suits were pending. But these facts can not affect the principles upon which the decision of this case depends.

The only remaining question is as to the plaintiffs' right to a judgment against the defendant on the original causes of action, on which the suits in Connecticut were founded.

To maintain the present suit on these causes of action it must be assumed that Brewer, the present defendant, stands wholly unaffected by the judgments, and that these original causes of action are not merged in them, but remain good as against him.

But any suit on these original causes of action is very clearly barred by the statute of limitations. The causes of action accrued in 1837 or 1838. The plaintiffs were under no disability, and were not within the exception of persons beyond sea. The bar, therefore, took effect in six years from the time the causes

of action accrued, which was more than six years before the commencement of this suit.

It was urged, in the argument for the plaintiffs, that the operation of the statute of limitations was prevented by the proceedings in the suit in equity. But the decree in that suit was in 1840, more than six years before this action was instituted. The court are unable to see how any new promise, on the part of the defendant Brewer, can be implied from anything in the proceedings on the decree in equity; but if such new promise could be so implied, any suit upon it was barred by the statute of limitation before the present suit was commenced.

Judgment for the defendants.

JUDGMENT OF COURT WHICH HAS NO JURISDICTION IS VOID: See *Lorejoy v. Albee*, 54 Am. Dec. 630, note 633; *Rogers v. Evans*, 52 Id. 300, note 392, where other cases are collected.

JURISDICTION OF STATE COURTS IS LIMITED BY STATE LINES: See *Lorejoy v. Albee*, 54 Am. Dec. 630, note 633; *Ewer v. Coffin*, 48 Id. 587, note 589, where other cases are collected. Courts of a state have no jurisdiction over a party not within its jurisdiction, and not there served with process: *Mowry v. Chase*, 100 Mass. 85, citing the principal case.

DEFENDANT CALLED ON TO ANSWER TO JUDGMENT rendered against him in the court of another state may prove any fact tending to show that such court had no jurisdiction over him so as to give effect to such judgment: *Carleton v. Bickford*, 13 Gray, 596, citing the principal case. He may controvert any and all facts upon which such judgment purports to be founded: *City of Salem v. Eastern R. R. Co.*, 98 Mass. 448, citing the principal case.

APPEARANCE OF ATTORNEY: See *Roselius v. Delachaise*, 52 Am. Dec. 597, note 599, where other cases are collected.

GLEASON v. SMITH.

[9 CUSHING, 484.]

QUANTUM MERUIT UNDER SPECIAL CONTRACT.—Where a party to a contract for building a dam, acting in good faith and intending to fulfill his contract, unintentionally fails in some particulars to perform it, he may recover from the other party to the contract so much as the labor and materials are worth to the latter, deducting from the contract price so much as the dam built by him is worth less than the dam contracted for.

DEBT on a sealed contract entered into by the plaintiff with the defendants to build for them a dam according to the specifications and terms thereof. There was a second count upon a *quantum meruit* and *quantum valebant* for the work done and materials furnished in building the dam. There was evidence that the plaintiff, although he built a dam, had failed to fulfill

the contract. The jury found for the plaintiff. The other facts appear from the opinion.

S. W. Bowerman, for the plaintiff.

H. L. Dawes, for the defendants.

By Court, *Drewry*, J. This case does not differ from the cases that have been so frequently before the court, in which it has been held that a strict literal fulfillment of a building contract was not a condition precedent to a recovery upon the contract. In terms, the last payment was to be made when the work was completed, but that does not take the case out of the rule, and where the party has acted in good faith, and has unintentionally failed, in some particulars, to perform the contract, he may yet recover for his services, deducting therefrom such sums as will fully indemnify the other party for any deficiency in the work. The only question in this case, as it seems to us, is as to the proper rule for assessing damages.

It is not that the jury are to give what the building is worth to the owner, for that would be to disregard the contract. The rule, as stated in our earliest reported case on this subject, was in terms like those stated by the presiding judge upon the trial of this case. The first position stated by the court, that the plaintiff was to recover of the defendants so much as the work and labor were worth to the defendants, would have been erroneous if standing alone, but it was qualified by the mode in which the jury were directed to arrive at that result, namely, by deducting from the contract price so much as the dam built by him was worth less than the dam contracted for.

The rule for making the deduction from the contract price for the deficiency in the work has been sometimes stated in another form, that the jury would take, as the basis of the calculation, the contract price, and deduct from that sum such an amount as would be required to be paid to complete the work according to the contract, as was done in *Snow v. Ware*, 13 Met. 42, and *Smith v. First Congregational Meeting House in Lowell*, 8 Pick. 178.

Probably the result would be much the same under either of these rules. In many cases the latter rule would not be adapted to the case, as where the building was wholly finished, but there was some small departure from the contract in some of the details; there the rule must be to deduct so much from the contract price as the work was worth less to the owner.

On the other hand, where the omission was in a failure to

complete the work, and such defect was capable of being supplied by additional expenditure of labor or materials, the proper rule would seem to be to deduct such sum as would cover all future expenses necessary to complete the work according to the contract. What these deficiences from the contract were in the present case does not distinctly appear in the bill of exceptions.

So far as the case is stated, the ruling, in the form it was given, is not open to the exceptions taken.

Judgment on the verdict.

QUANTUM MERUIT UNDER SPECIAL CONTRACT: See *McKinney v. Springer*, 54 Am. Dec. 470, note 479, where numerous other cases are collected. A party may recover what labor and materials furnished by him are worth, although he may not have complied with the stipulations of the contract; *Thompson v. Purcell*, 10 Allen, 428, citing the principal case. But to an instruction that a plaintiff may recover what his work and materials are worth must be added that the jury shall deduct from the contract price so much as the work done is worth less than the work contracted for: *Vearie v. Hoerner*, 11 Gray, 398. The difference or deficiency is ordinarily the measure of damages in such a case: *Moulton v. McOwen*, 103 Mass. 591:

JACKSON v. PIXLEY.

[9 CUSHING, 490.]

DEFENDANT IN TROVER IS NOT ESTOPPED from showing that he was not in fact in the possession and control of the property at the time of the demand, although at that time he induced the plaintiff to believe the contrary.

TROVER to recover the value of a pair of horses. The defendant pleaded the general issue, and filed a specification of defense that he never owned the horses and never had the control or possession of them, but that they belonged to his son John Pixley. The plaintiff offered evidence to show that when he called upon the defendant to demand the horses, the defendant told him that he had bought the horses and paid for them, and no man could have them. The defendant introduced testimony to prove that at the time of the plaintiff's demand the horses were the property and in the control and possession of his son John, and that they were not the property nor in the possession of the defendant. The plaintiff requested the judge to instruct the jury that if the defendant was in any way apparently concerned in the detention when applied to for the restoration of the horses, and by his answer induced the plaintiff to believe that

he had the possession and power to deliver them up, and refused to do so, and the plaintiff was thereby induced to sue him, he could not defend on the ground that he had not, when applied to, the control and disposition of the horses. The judge refused to give such instruction, but instructed them that this would not in law estop the defendant from showing that he was not in fact concerned in their detention, and had not the control and possession of the horses at the time of the demand. There was a verdict for the defendant, and the plaintiff filed his exceptions.

M. Wilcox, for the plaintiff.

I. Sumner, for the defendant.

By COURT. The question of conversion was a question of fact for the jury, and as such it was left to them on the evidence. The fact that the defendant said, in the first instance, that the horses were his, and that he bought them and had the possession and control of them, was strong evidence against him, but it was not conclusive; and the court could not, therefore, charge, as matter of law, that it was.

Exceptions overruled.

ADMISSIONS WHICH HAVE BEEN ACTED UPON BY OTHERS ARE CONCLUSIVE against the party making them, and will bar every attempt to erect a defense upon their alleged falsity: *McMahan v. McMahan*, 53 Am. Dec. 481, note 487, where other cases are collected. But where admissions or declarations have not been acted upon by others, nor been productive of injury to them, the party making them is not precluded from showing the truth to be to the contrary: *Carter v. Darby*, 50 Id. 156. And see note to *Dexell v. Odell*, 33 Id. 631, where this subject is discussed.

STEARNS v. HENDERSASS.

[9 Cushing, 497.]

ADVERSE AND EXCLUSIVE POSSESSION FOR TWENTY YEARS IS GOOD BAR to a writ of entry, although the defendant's title may have been derived through mesne conveyances from the tenant.

TENANT IN WRIT OF ENTRY IS NOT ESTOPPED BY HIS COVENANT OF WARRANTY in a deed to his grantee, to whom he conveyed a good title, from setting up a subsequent title acquired by disseisin.

DECLARATION OF GRANTEE OF LAND MADE MORE THAN TWENTY YEARS before the commencement of an action for the recovery of the land, where the defense relied on is an adverse and exclusive possession for a period sufficient to constitute a bar under the statute of limitations, that the entire title to the premises was, at the date of such declaration, in the

tenant in such action, is admissible in evidence upon the question of adverse possession in the tenant under a claim of right. But declarations of such grantee, made after his insolvency and the conveyance of his interest in the premises to an assignee, and after twenty years' adverse possession by the tenant, are not admissible.

Writ of entry. The declarations made by Blake in 1826, referred to in the opinion, and which were admitted on the trial, were to the effect that the entire title to the premises, at the time of the declarations, was in Hendersass, and expressly disavowing any title in himself. The jury found a verdict for the tenant. The other facts are stated in the opinion.

J. T. and T. Robinson, for the defendant.

W. Porter, for the tenant.

By Court, DEWEY, J. The defendant derives title under a conveyance from the tenant, of date of April 2, 1826, to Harvey Blake, and a conveyance by the assignee of the grantee, Blake, who was authorized to convey all his right and title in the demanded premises.

The documentary evidence establishes a good title in Blake, the insolvent, in April, 1826, and the further question is, whether such title has been defeated or lost.

The tenant, in his defense, relies upon a subsequent title acquired by disseisin. To sustain this he shows those acts of open, notorious, exclusive, adverse possession, for a period of more than twenty years, which would be amply sufficient, in ordinary cases, to establish such adverse possession as under our statutes would bar a writ of entry to recover the same.

It is then insisted by the defendant, that from the peculiar relation in which the tenant stands as to this title, he can not set up the defense of an adverse possession, to defeat the same. In other words, that, having been the grantor of the premises to Blake, in 1826, he is estopped from denying the title of Blake or those claiming under him.

The first error of this position or ground estoppel is, that it assumes what is not in fact true. The proposed defense does not impeach the deed to Blake. It admits its full force and effect as a valid deed. It concedes that, at its date, a good title passed to the grantee by virtue of it. The whole foundation of the defense rests upon an after-acquired title by the tenant, or subsequent acts divesting the grantor of his interest in the premises. Full effect is given to the deed of the tenant to Blake, when it is held to vest the absolute title in Blake at its delivery,

and that it estops the tenant from setting up any other title as then held adversely. The grantor, in such case, may show a subsequently acquired title from his grantee, and it is no answer to an alleged disseisin, or a bar by more than twenty years' adverse possession, that the disseisor, previous to his entry and the commencement of his adverse possession, fully acknowledged the title of the disseisee. Such was the case of *Sumner v. Stevens*, 6 Met. 337; *Barker v. Salmon*, 2 Id. 32.

All that is necessary to be shown is an adverse and exclusive possession of twenty years, and this being shown constitutes a good defense to the action. The act, in such a case as the present, must be clear and unequivocal, as a possession claiming title adverse to the true owner, but if shown, it is a good bar to an action by him who has only a good paper title.

Secondly, it is urged that the covenants of warranty in the deed of the tenant to Blake estop him from setting up this defense, and that they may be relied on as a rebutter, to avoid circuity of action.

The principle of rebutter is one of frequent application, and in proper cases is to be allowed as a good bar.

Thus if A. by his deed conveys to B. land, with covenants of warranty, not having in fact the title, but subsequently acquires the title, such subsequently acquired title inures to the benefit of B., the grantee, by reason of the covenants of warranty of A.

But it will readily be perceived that the foundation of this rule rests upon the fact the party thus conveying with warranty had not the title he professed to convey, and was liable therefor on his warranty. But such was not the case here. It was a good title that was conveyed, and there was no breach of any covenant, and of course no ground for estoppel against the tenant by reason of his covenant with warranty.

2. As to the objection to the admission of the declarations of Blake, in June, 1826, that they were inadmissible because they tend to invalidate the deed under which he then held, and for the further reason that their admission is in violation of the rule which excludes parol testimony offered to contradict written documents, these grounds are, in the opinion of the court, untenable. The declarations of Blake offered in evidence apply to a period after the making of the deed to him. The title may have been in him at the date of the deed, and yet it may be true that, at the date of these admissions, three months after, he had relinquished all claim, and yielded to the tenant, disavowing any title in himself. It was certainly competent evi-

dence as bearing upon the question of adverse possession in the tenant, under a claim of right. It tended to establish such adverse possession with the knowledge of Blake, and to show his acquiescence in such adverse claim.

3. The further ruling of the court, excluding the declarations of Blake, after twenty years' adverse possession, and after he had become the subject of proceedings in insolvency, and his interest passed to an assignee, was also correct.

The result is, that all the exceptions are overruled.

Judgment for the tenant.

DISSEISNE'S RIGHT OF ENTRY IS BARRED BY LIMITATION, when the disseisors have held the premises by a continual disseisin for twenty years: *School District v. Benson*, 52 Am. Dec. 618.

WHAT CONSTITUTES ADVERSE POSSESSION: See *Moody v. Fleming*, 48 Am. Dec. 210, note 216; *Wright v. Guier*, 38 Id. 108, note 115, where other cases are collected; *Dikeman v. Parrish*, 47 Id. 455, note 485, where other cases are collected.

GRANTEE IN DEED IS NOT ESTOPPED from claiming title under another conveyance: *Casey's Lessee v. Inloes*, 39 Am. Dec. 658, note 686.

GRANTOR MAY DISSEISE HIS GRANTEE: *Johnson v. Bean*, 119 Mass. 271; *Sherman v. Kane*, 46 N. Y. Supr. Ct. 327, both citing the principal case.

HOWE v. LAWRENCE.

[⁹ CUSHING, 553.]

BONA FIDE SALE OF ALL PARTNERSHIP EFFECTS MADE BY ONE PARTNER to another, at the dissolution of the partnership, is valid, and the property so sold becomes the separate estate of the purchaser, although the firm and both partners are at the time insolvent.

SEPARATE ESTATE OF PARTNERS MUST BE FIRST DISTRIBUTED TO SEPARATE CREDITORS, under the Massachusetts statute, although there may be no solvent partner and no joint estate to which the joint creditors can resort.

PETITION to this court to reverse an order of distribution made by Lawrence, a commissioner of insolvency on the estate of William W. Gardner, an insolvent debtor. The case was referred to a master, who made a report, to which reference is made in the opinion. The commissioner of insolvency ordered that the separate creditors of Gardner should be paid in full from his estate and that the balance remaining should be distributed to the joint creditors of the firm of Shaw & Gardner. The petitioners were creditors of the firm of Shaw & Gardner, and had proved their claim against Gardner's estate. Shaw was also in insolvency, and there was no property of the former firm of

Shaw & Gardner except what had been conveyed to Gardner. The other facts are stated in the opinion.

C. P. Huntington, for the petitioners.

G. Ashmun, for the respondents.

By Court, Bigelow, J. Upon the facts reported by the master in this case, two questions arise.

The first is, whether the property, which belonged to the partnership of Shaw & Gardner, and which, upon the dissolution of the partnership, on the twenty-fourth of January, 1851, was sold and transferred by Shaw to Gardner, is to be treated as the separate estate of Gardner, and to be appropriated as such to the payment of his separate debts; or whether, notwithstanding the sale and transfer by one partner to the other, it is still to be regarded as joint estate, and to be applied to the payment of the debts of the partnership accordingly.

The right of copartners upon dissolution to transfer the joint property to one of the firm is clear and unquestionable. The effect of such transfer as between the partners is to vest the legal title to the property in the individual partner, with a right to use and dispose of it as his separate estate. It would seem to follow, as a necessary consequence, that the creditors of the firm, after such conveyance, would have no right to look to the property transferred as joint property, upon which they had any special claim or lien. If in such transfer there is no fraud and collusion between the copartners for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith, upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate, with all the rights and incidents, both in law and equity, which properly attach thereto. The mere fact of the transfer of the property does not in any way affect the rights of the joint creditors. During the continuance of the partnership, and before the institution of proceeding in insolvency, the creditors of the firm have no specific claim or lien, and, strictly speaking, no equity as against the effects of the partnership. They can only institute actions at law for their debts against the firm on which they can take the partnership property, or the separate estate of such partner, or both, for the purpose of satisfying the executions, which they may obtain upon their judgments against the firm. The joint property, after its transfer to one of the copartners, is equally within the reach of legal process by the creditors of the firm as if it had

remained the property of the partnership. Beyond this right to seize the joint property on legal process, the creditors of the firm, before proceedings in insolvency, have no control over the partnership effects, and no right, either in law or equity, to restrain the disposition of them. The partners have the power to transfer them for a valuable consideration to each other or to strangers. The only limitation upon this right is, that it shall be exercised *bona fide*, and without any intent to defraud the creditors of the firm or to deprive them of their legal or equitable claims upon the joint estate in case of insolvency. The *bona fides* of the transaction is, therefore, the only test by which to determine the right of joint creditors to have property, which has been transferred upon dissolution to an individual member of the firm, applied to the payment of the joint debts. If the transfer has been made honestly and for a valuable consideration, the property has thereby become separate estate, wholly free from any claims of the joint creditors. These principles are fully recognized in the adjudged cases, both in this country and in England: Collyer on Part., secs. 174, 894, 903; Story on Part., sec. 358; *Ex parte Ruffin*, 6 Ves. 127; *Ex parte Fell*, 10 Id. 347; *Ex parte Williams*, 11 Id. 3; *Ex parte Rowlandson*, 1 Rose, 416; *Campbell v. Mullett*, 2 Swans. 575; *Allen v. Center Valley Co.*, 21 Conn. 130, 137 [54 Am. Dec. 333]; *Feraon v. Monroe*, 20 N. H. 462, 469.

These cases also recognize it as a settled rule that joint estate is not, so far as the rights of creditors are concerned, that which was such at the time of the dissolution, but that in which the partners are jointly interested for the purposes of the partnership and the settlement of its concerns at the time of the institution of proceedings in insolvency by a member of the firm.

The application of these principles to the present case is decisive against the right of the joint creditors to require the property, transferred by Shaw to Gardner, to be appropriated primarily to the payment of the debts of the firm. *Prima facie* it is the separate estate of Gardner, and the burden is on the petitioning creditors to show that it was conveyed to him *mala fide* and in fraud of the rights of creditors. There is nothing in the facts reported by the master from which any such inference can be fairly made. The dissolution took place because the parties were mutually dissatisfied, and the retiring partner relinquished his right to the partnership property in consideration of an agreement by his copartner to assume and pay the

debts of the firm. It is not pretended that the business of the firm has resulted in any surplus, nor that the agreement to pay the debts was not a fair and full consideration for the transfer of the retiring partner's interest in the partnership property. The subsequent conduct of Gardner is strongly confirmatory of the good faith of the transaction. He continued to carry on the business, formerly conducted by the firm, and notified the creditors by letter of the dissolution, and that the business would be continued by himself. While he so carried on business on his sole account, he made considerable additions to the stock on his own credit, amounting to five or six hundred dollars. Nor is there any positive evidence that either of the copartners, at the time of the dissolution, knew or believed that the co-partnership would not be able to pay its debts in full, although in fact it subsequently turned out to have been at the time insolvent. Even if it were insolvent within the knowledge of the partners at the time of the dissolution and the transfer of the property, it is by no means certain that the transaction would then be fraudulent: Collyer on Part., sec. 902; *Ex parte Peake*, 1 Madd. 346. But it is sufficient for the present case that there is no proof of any such knowledge by either of the copartners.

It is not to be inferred, however, that any conveyance or transfer of joint property to a copartner, made with a knowledge of the insolvency of the firm and with an intent to deprive the creditors of its proper application to the payment of the joint debts, would defeat the right of the joint creditors in proceedings in insolvency to follow the partnership effects and have them appropriated to the payment of the debts of the firm. Such conveyance would be in fraud of the law, and equity would at once set it aside. It is only where partners act fairly for the purpose of dissolution and winding up the affairs of the firm that creditors will be bound by a change of the partnership property to the separate estate of one of the copartners.

It was urged by the counsel for the petitioners, that, as copartners have a lien upon the partnership effects for the discharge of all the debts of the firm, even after a dissolution, this lien might be made available in the present case for the benefit of the joint creditors; and that in this way the equities of the creditors might be worked out through the medium of that of the retiring copartners. It is undoubtedly true, in the absence of any special agreement between copartners, as to the application of the partnership effects after dissolution, that a retiring partner retains a lien upon them to the extent of enforcing their

application to the payment of the joint debts, and that creditors, though they have no lien on the property in their own right, are allowed in equity to assert a *quasi* lien by administering the equities between the partners themselves. But it is equally well settled that a retiring partner may relinquish this lien, in which case he has no equity through which the creditors of the firm can work out their own. By the transfer of the joint property to his copartner, and taking his personal contract and security for the payment of the joint debts, he discharges his lien and substitutes therefor the agreement of his copartner, to which he can alone look for his remedy, in case he is called on to pay the debts of the firm. There is no duty left on the property, but only a personal obligation by one copartner to pay the joint debts. The creditors in such case can not rest upon the equity of the outgoing partner: Collyer on Part., sec. 894; Story on Part., sec. 359; *Ex parte Ruffin*, 6 Ves. 127; *Ex parte Williams*, 11 Id. 3. The transfer in the present case falls within this principle. Shaw, the retiring partner, relinquished all his right to the property of the firm, in consideration of a promise by Gardner to pay all the debts of the firm. Shaw, therefore, has no lien which can be enforced for the benefit of the joint creditors upon the partnership effects. The property was transferred absolutely, discharged from any lien or trust which would have attached to it in the absence of any special agreement between the partners respecting it.

The remaining question presented by the petitioners is as to the right of the joint creditors of the firm to prove their debts against the separate estate of Gardner, and take dividends thereon *pari passu* with the separate creditors. This claim is founded upon the recognized exception to the general rule of applying joint estate to the payment of joint debts, and separate estate to the payment of separate debts, which has been established by the English courts in bankruptcy. That exception is, when there is no joint estate and no solvent partner, the joint creditors are allowed to prove and share equally with the separate creditors in the separate estate. It is a sufficient answer to this claim of the petitioners that the statute of 1838, c. 163, sec. 21, recognizes no such exception to the rule therein prescribed for the distribution of the assets of insolvent debtors. The rule is distinct and peremptory, requiring the net proceeds of the joint stock to be appropriated to pay the creditors of the firm, and the net proceeds of the separate estate of each partner to be appropriated to the payment of the separate creditors.

This provision was reported by the learned commissioners who drafted the insolvent act, and enacted by the legislature with a full knowledge of the exceptions which had been ingrafted on the general rule of distribution by the course of judicial decisions in England. They designedly omitted them. We know of no rule of construction by which we can now undertake to add them to the statute. The rule fixed by the statute may sometimes operate harshly, as all general rules do, but it is definite, clear, and easily applied. The exceptions to it are artificial and refined, leading to nice and subtle distinctions, and sometimes operating with great inequality and injustice. Indeed, it has been said by high authority that the character of these exceptions has rendered the foundation of the general rule, as one of justice and equity, open to criticism and question, and difficult to be sustained: Story on Part., secs. 379, 382. Under such circumstances, we are unwilling to adopt it into our jurisprudence. The rule fixed by the statute must be adhered to. If there is no joint estate and no surplus of the separate estate after paying the separate debts, the creditors of the partnership can receive no dividend.

Such being the legal and equitable principles applicable to the case made by the petitioners before the commissioner of insolvency, it is clear that there is no ground for maintaining the petition.

Petition dismissed.

RETIRING PARTNER HAS RIGHT TO DISPOSE OF HIS INTEREST IN PARTNERSHIP ASSETS by a *bona fide* sale thereof to his copartner, and after such sale the property becomes the separate property of the buyer: *Robb v. Mudge*, 14 Gray, 537, citing the principal case. But such transfer, if made *mala fide*, is void, as being in fraud of the joint creditors: *Phillips v. Ames*, 5 Allen, 186, citing the principal case. Creditors of partnership have no equity to prevent partners from transferring their property to each other, or from changing its character from joint to separate property, provided the transfer is made in good faith: *Richards v. Manson*, 101 Mass. 487; *Robb v. Mudge*, 14 Gray, 539, both citing the principal case. When one of two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner has the same dominion over it as if it had always been his own separate property: *Barkley v. Tapp*, 87 Ind. 29; *In re Cook & Gleason*, 3 Biss. 124; *Dimon v. Hazard*, 32 N. Y. 178, all citing the principal case. Where a retiring partner, before insolvency, transfers partnership property to the continuing partner, it can not be reclaimed for the benefit of the joint estate: *Harmon v. Clark*, 13 Gray, 123; *Richardson v. T'obey*, 3 Allen, 83; *In re Isaacs & Cohn*, 6 Nat. Bank. Reg. 101; *In re Long*, 9 Id. 236, all citing the principal case. An agreement of a retiring partner to pay the debts and to take the assets converts the joint estate into separate property of the remaining partner: *Harmon v. Clark*, 13 Gray, 121, citing the principal case.

SEPARATE PROPERTY OF EACH PARTNER IS TO BE APPLIED to the payment of the separate debts of the partner to whom it belongs: *Purple v. Cooke*, 4 Gray, 123; *In re Knight*, 2 Biss. 520, both citing the principal case.

RIGHT OF PARTNERSHIP CREDITORS TO PRIORITY OF PAYMENT out of partnership assets: See *Allen v. Center Valley Co.*, 54 Am. Dec. 333, note 338, where this subject is discussed; *Camp v. Grant*, Id. 321, note 332, where other cases are collected.

BRAINARD v. CLAPP.

(10 Cumine, 6.)

RAILROAD COMPANY MAY REMOVE ORNAMENTAL OR OTHER TREES within the limits of the land taken under their charter for a roadway to fit their track for safe and convenient use, either when originally constructing the road or afterwards.

RAILROAD COMPANY ARE JUDGES OF NECESSITY OF CUTTING TREES inside their right of way, and may authorize it to be done by any officer or agent, and the burden of proof to justify it does not rest upon them.

OWNER OF LAND TAKEN FOR PUBLIC WAY OWNS FEE, AND HERBAGE, trees, or minerals upon or within it, subject, however, to the public use for the purposes for which it was taken and incidental purposes.

TRESPASS. The case is stated in the opinion.

A. Brainard and D. Aiken, for the plaintiff

C. P. Huntington, for the defendant.

By Court, SHAW, C. J. This is an action of trespass *quare clausum*. The ground of the plaintiff's complaint, as set forth in various counts, is, that the defendant unlawfully entered on the plaintiff's land, and caused trees, to the number of fifteen, to be cut down and destroyed. The defendant, with the general issue, filed a specification of defense, justifying the alleged trespass, as the president, agent, and servant of the Connecticut River Railroad Company, on the ground that the acts complained of were done within the limits of land taken by said company, for the construction of the railroad, by virtue of the rights and powers vested in them by their charter, and that said alleged acts of trespass were committed in the necessary use and enjoyment of the franchise granted to them by law. The defendant specifies other grounds, for the company disclaims all title to the land out of their limits of five rods, or any easement therein.

It appears by the bill of exceptions that the action was brought for cutting down walnut and cherry trees growing on the close of the plaintiff, for use, ornament, shade, and fruit. The cut-

ting complained of was within the limits of the five rods laid out over the plaintiff's land by the railroad company, and for which his damages had been assessed and paid.

The defendant claimed that the trees obstructed the view of the track near the depot in the village of Greenfield, and it was necessary to the safety of the road, and those using it and working on it, that this obstruction should be removed. The court ruled that the defendant could justify only on the ground that the acts complained of were necessary to carry out the objects and purposes intended by their charter, and that the burden of proof was on the defendant to prove such necessity.

Without following the bill of exceptions minutely, it may be sufficient to say that the court ruled that if the trees standing within the limits of the land taken for the road were an obstruction, or made the track unsafe or inconvenient to the company or their agents, the defendant, as the agent of the company, had a right to cause them to be cut down; that in judging of the safety and convenience of the road, the acts of the company were entitled to a favorable construction; that the company had the exclusive right to the use of the plaintiff's land taken, so far as it was necessary to carry into operation all the objects embraced within the scope of their act of incorporation; but the officers of the company were not the sole and exclusive judges of what was to be removed from the land taken, but the necessity of the removal might be judged of by the jury; and if there were clearly no necessity for such removal, then the defendant would be responsible for cutting the trees in question. To these directions the defendant excepted, and the case has now been brought before this court for revision.

In a general view of the law, the court are of opinion that, *prima facie*, the railroad company are authorized to do all acts within the five rods, which by law constitute their limits, in taking away or leaving gravel, trees, stones, and other objects, which in their judgment may be necessary and proper to the grading and leveling the road, in adjusting and adapting it to other roads, bridges, buildings, and the like, so as to render it most conducive to all the public uses which the railroad is designed to accomplish. Whatever acts, therefore, are requisite to the safety of passengers on the railroad, to the agents, servants, and persons employed by the company, and to the safe passage of travelers on and across highways and roads connected with it, and which can be done within the limits of five rods, the company have a right, under their act of incorporation, to do. This

is embraced in the idea of "taking" land for public use. It is an appropriation of the land to all the uses of the land for the road, necessary and incidental. This appropriation the company are authorized to obtain by purchase, if it can be done; but if the owner refuses, then the company, by their officers and engineers, have the right and power to lay out the land, paying a compensation to the owner therefor, to be adjusted and settled, first by commissioners, and ultimately by a jury; and practically the damages are commonly equal to the value of the land. To this extent the power of the public, under the right of eminent domain, to provide for carrying into effect a proposed public enterprise for the common good, is transferred to the company, and their decision, therefore, must be definitive, except when, under special provisions of law, they are bound to conform to the directions of the company's commissioners or other officers appointed for the purpose.

In the case of *Worcester v. Western Railroad Corporation*, 4 Met. 564, it was held that a railroad company had a right to erect buildings within the five rods, if reasonably incident to the use of the road, and that they had authority, acting for the public, to make all the uses of the land which would facilitate the public use, that of the transportation of persons and property.

Several of the authorities go to show that where land is thus taken and paid for, for public use, the public, or those corporations who act as agents and trustees for the public, have a right to make all the use of the land which the necessity and convenience of the public may require, and that the land owner receives in damages a compensation, which, in theory of law, is an indemnity for all such uses: *Stevens v. Middlesex Canal*, 12 Mass. 466. So in *Callender v. Marsh*, 1 Pick. 431, the court say streets become public property by the act of laying them out, and the value of the land taken must have been either paid for or given to the public at the time, or the street could not have been legally established. And being legally established, although the right or title in the soil remained in the owner, yet the public acquired the right, not only to pass over the surface, but to dig down and remove soil for the purpose of improvement.

This was so far afterwards altered by statute as to allow an adjacent owner some compensation in case of change of grade; but that does not affect the principle on which that decision rested.

So in the case of *Robbins v. Borman*, 1 Pick. 122, the court recognize the principle that the owner of land over which a turnpike passes still retains his title, and may have an action against a stranger who plows it. But, say the court, if the plowing had been for the purpose of mending the road, it would have been a good defense. This plainly implies that such plowing, being done under the authority of the proprietors, would be justifiable.

So in *Tucker v. Tower*, 9 Pick. 109 [19 Am. Dec. 350], though a turnpike company have an easement only, and do not acquire a fee in the soil, yet within the limits of the road as laid out they may make any use of the land which is necessary for the enjoyment of the franchise; they may erect a toll-house, a dwelling-house for the tollman, may dig a cellar and a well, cut down trees, and the like.

It appears to us that the cases cited on the other side do not impugn these principles. They certainly do establish the point that, by the common law, the fee of the soil over which a public way of any kind is laid remains in the owner; that he is entitled to the herbage and trees growing on it, and the minerals under it; but they hold in like manner that the use is in the public, or those who represent and act for the public, that this includes all the uses incident to the accomplishment of the public objects for which their charters had been granted; and if these, in their nature, require the cutting down and removal of trees, such rights vest in the public: *Barclay v. Howell*, 6 Pet. 498.

This rule is general, and applies to all cases where land is taken for highways, town ways, turnpikes, canals, and railroads; the principle is, that such right extends to all uses directly or incidentally conducive to the enjoyment of the franchise, and the advancement of the public benefit, contemplated by the establishment of such public work. But it is quite obvious that, though the principle is general, the extent of such use must vary, not only according to the exigencies of each particular kind, but to the varying circumstances of each species of public work. A canal, for instance, must have a towing-path as necessarily incident; roads must have drains and culverts, and a railroad, turn-outs, platforms, depots, and the like. And it is obvious that railroads, with their engines and trains, from their complicated character and peculiar mode of operation, may require more and larger uses of the land for running and managing trains safely than other public ways; but what they do

require is within the limits of the grant, and where they are not especially prescribed or limited, must be determined by the nature of such exigency. And if trees are found to be dangerous in running cars, by obstructing the view of engineers and conductors up and down the track, in approaching depots, crossing highways on the same grade, or otherwise, the company have the same right to cut them down, standing within their limits, as if they tended to obstruct the passage of trains, and thus endanger their safety.

And the court are also of opinion that the right and power of the company to use the land within their limits may not only be exercised originally when their road is first laid out, but continues to exist afterwards; and if, after they have commenced operations, it is found necessary in the judgment of the company to make further uses of the land assigned to them, for purposes incident to the safe and beneficial occupation of the road, by raising or lowering grades, cutting down hills, and removing trees, they have a right to do so to the same extent as when the railroad was originally laid out and constructed. All the reasons of necessity, propriety, and fitness which apply to the one case are equally applicable to the other. And we think the authorities equally apply. *Callender v. Marsh*, 1 Pick. 431, was the case of a street and ancient highway. *Tucker v. Tower*, 9 Id. 110 [19 Am. Dec. 350], was the case of a turnpike, where a new use was made of the land, by erecting a toll-house, and cutting trees for that purpose, long after the road was established.

The case of railroads may be regarded as standing on somewhat stronger grounds in this respect, for several reasons: because railroads are extremely costly, and proprietors can not in the outset make and complete all the works which they contemplate and intend to make; because these works are comparatively new, and improvements are constantly making in the structure and management of the works, and thus companies may profit by their own experience and that of others; and because an increase in the business of carrying passengers and freight may call for new works after the roads have gone into operation, and these are new exigencies calling for a new use of the land assigned to them.

In applying these views of the law to the present case, the court are of opinion that the directions of the learned judge were incorrect in several respects. We think they were thus incorrect in directing, in the outset, that the defendant could

justify only on the ground that the acts complained of were necessary to carry out the objects and purposes intended by their charter, and that the burden of proof was on the defendant to prove the necessity.

Further: although the learned judge did instruct the jury that the company had the exclusive right to the use of the plaintiff's land so taken, as far as necessary, yet it was connected with another direction, in which he instructed the jury that the officers of the company were not the sole and exclusive judges of what was to be removed from the land taken, but the necessity of the removal might be judged of by the jury; and if there were clearly no necessity for such removal, then the defendant would be responsible for cutting the trees. Whereas, we think the jury ought to have been instructed that the company had a right, under the powers given them by their act of incorporation, to cut down the trees in question, as one of the acts to be done on the land within the five rods, to fit and prepare the track for the safe and convenient use of it, for the transportation of persons and freight by cars and locomotive engines; that they were the judges of what this exigency required, and that if the defendant, being their agent for this purpose, cut down the trees by their authority, he was justified in doing so. And also, that such authority might be given by the company to their president, agents, and officers, either by by-laws, providing for the appointment of such officers, and defining their powers, or by a general or particular vote, or by any other mode by which an aggregate corporation can express its will and exercise its powers.

Without going over the whole of the bill of exceptions, the court are of opinion that the verdict must be set aside, and a new trial had.

Verdict set aside.

RIGHT OF RAILROAD COMPANY TO REMOVE OBSTRUCTIONS, such as buildings, etc., within limits of land appropriated for its use under the power of eminent domain: See *Brocket v. Ohio etc. R. R. Co.*, 53 Am. Dec. 534. A railroad company or its officers are the judges of the extent to which it is necessary or convenient to make use of the land included in their location, and of the mode of use which will best answer the purposes of its appropriation: *Curtis v. Eastern R. R. Co.*, 14 Allen, 58; *Boston Gas Light Co. v. Old Colony etc. R. R. Co.*, Id. 446; *Presbrey v. Old Colony etc. R. R. Co.*, 103 Mass. 5, all citing the principal case. In *Curtis v. Eastern R. R. Co.*, *supra*, it is said that they are not the final judges, but must show that a particular injury done to the land in the assumed exercise of their rights was reasonably necessary. On the other hand, it is said in *Presbrey v. Old Colony etc. R. R. Co.*,

supra, that the railroad officers are the sole judges of an exigency making it necessary or expedient to close a private way crossing their line. So it is held in *Proprietors v. Nashua etc. R. R. Co.*, 104 Id. 9, that the proper officers of such a corporation are the sole judges of what is proper or convenient as a means for attaining the end, and performing the service for which their franchise was granted.

LAND TAKEN FOR PUBLIC USE MAY BE APPLIED TO ANY PURPOSE CONDUCIVE to the enjoyment of the public easement, directly or indirectly, by the public or the corporation or other agent through whom the power of appropriation is exercised: *Boston v. Richardson*, 13 Allen, 159, citing the principal case. Hence, sewers or culverts may be constructed to render a highway more serviceable: *Id.*

FEE IN LAND APPROPRIATED FOR HIGHWAY remains in the former owner, subject to the public easement: See *Lewis v. Jones*, 44 Am. Dec. 138; *Southerland v. Jackson*, 50 Id. 633, and cases cited in the note to the former of those decisions.

TWITCHELL v. SHAW.

[10 CUSHING, 46.]

RECEIPT FOR SMALLER SUM IS NO DISCHARGE OF LARGER, it seems, as between the parties.

OFFICER SERVING VALID EXECUTION AFTER PAYMENT of the amount by the debtor to the plaintiff in the writ, although the debtor shows such officer a receipt in full, is not liable in trespass or case if not notified by the execution plaintiff not to serve it.

TRESPASS against the defendant, as constable, for taking certain harness. By amendment the action was afterwards turned into an action on the case. From an agreed statement it appeared that the defendant seized the harness on a regular execution issued by a justice of the peace on a judgment recovered by one Kelly against the plaintiff. The execution was issued without Kelly's knowledge or direction, at the instance of the person who acted as his, Kelly's, attorney. A few hours after its issuance the plaintiff paid Kelly three dollars and took a receipt in full for the debt, neither party having any knowledge of the execution. The plaintiff afterwards learned from the justice that the execution had been issued, and he then went to the defendant, showed him the receipt, and asked him not to serve the writ. Subsequently, however, on the same day, the defendant seized the harness in question, against the protest of the plaintiff, and although informed by a person present at the settlement that he saw the money paid and the receipt given.

R. A. Chapman, for the plaintiff.

H. Morris, for the defendant.

By Court. The receipt which is made part of the case is not produced; but we understand that it was not a release under seal, but a receipt for three dollars in full satisfaction of the debt. We are strongly inclined to the opinion that as between the parties, a receipt for a smaller sum can not operate as the discharge of the larger, because it is without consideration for the excess, and is not an accord and satisfaction: *Brooks v. White*, 2 Met. 283 [37 Am. Dec. 95]; *Tuttle v. Tuttle*, 12 Id. 554 [46 Am. Dec. 701]. But another ground appears to us decisive. We do not understand that after the execution was delivered to the officer for service the plaintiff, the execution creditor, gave him notice not to serve it. The debtor exhibited his receipt, and offered a witness to prove the settlement. But the officer was not bound to investigate the genuineness or sufficiency of the receipt; he held an execution from a court of competent jurisdiction, and that was a legal justification to him for taking and selling the present plaintiff's property. No action, therefore, either of trespass or case, can be maintained against him by the present plaintiff: *Wilmarth v. Burt*, 7 Id. 257. The plaintiff not having directed the officer to discharge the execution, or forbear serving it, the question whether he could do so, and thereby take away the lien of the person acting as attorney, or whether he had a lien, does not arise.

Judgment for the defendant.

PAYMENT OF PART OR LIQUIDATED DEMAND IS NO SATISFACTION, though accepted: *Donohue v. Woodbury*, 52 Am. Dec. 777, and cases collected in the note thereto. In *Walan v. Kerby*, 99 Mass. 3, it is held, citing the principal case, that an express promise to accept a smaller sum in satisfaction of a debt, though a receipt in full is given, will not prevent a recovery of the balance.

OFFICER PROTECTED BY PROCESS, WHEN: See *Savacool v. Boughton*, 21 Am. Dec. 181, and note discussing this subject at length. See also *Cogburn v. Spence*, 50 Id. 140; *State v. Weed*, 53 Id. 188, and cases cited in the notes thereto. In *O'Shaughnessy v. Baxter*, 121 Mass. 515, 516, it is held that an officer acting in good faith under regular process is protected by it, and is not bound to go behind it and take the risk of determining the question whether the defendant, whom he is commanded to arrest, is really the person who signed the note upon which the action is brought, although he knows him not to be the person. So in *Leachman v. Dougherty*, 81 Ill. 328, the case is cited, *per Sheldon, J.*, dissenting, to the point that an officer is protected by process regular on its face, issuing from a competent court, independently of anything he may have heard outside of the process. But the majority of the court took a contrary view.

TRULL v. HOWLAND.

(10 Cushine, 109.)

DEFENDANT SUED BY WRONG CHRISTIAN NAME must plead the misnomer in abatement, or it is waived.

ARREST OF DEFENDANT DESCRIBED BY WRONG CHRISTIAN NAME in an execution does not render the arresting officer liable in trespass, if the defendant was described by the same name in the original writ and made no defense.

TRESPASS in the common pleas for assault and battery and false imprisonment, which consisted in arresting and imprisoning the plaintiff, whose real name was Jonathan A. Trull, under an execution against George A. Trull. The defendant introduced evidence to show that he made the arrest as constable under said execution; that the execution was issued on a judgment recovered against the plaintiff in an action in which he was sued and named in the original writ, which was duly served on him, as George A. Trull; that the plaintiff was intended to be and was in fact the person sued in said action; that he owed the debt for which the action was brought; that neither the plaintiff nor any one on his behalf appeared in said action, and that judgment was rendered against him by the name of George A. Trull; and the aforesaid execution duly issued thereon, and that the execution was in fact issued against the plaintiff by the said name of George A. Trull. The court below held that these facts constituted a good defense to this action. Exceptions by the plaintiff.

G. F. Hoar, for the plaintiff.

J. W. Weatherell, for the defendant.

By Court, DEWEY, J. This case does not present the question of liability of an officer for arresting on mesne process a party whose true name does not correspond with the name set forth in the process. The cases cited by the plaintiff's counsel were generally of that character. That of *Cole v. Hindson*, 6 T. R. 234, and which is the strongest case cited in behalf of the plaintiff, was however an action of trespass for taking and carrying away the plaintiff's goods under a *distringas* to compel an appearance to an action, the "party having neglected to appear on a summons served upon him, but describing him by a wrong Christian name," and it was held the action of trespass might well be maintained. The distinction to be taken between that case and the case of *Crawford v. Satchwell*, 2 Stra. 1218, seems to have passed un-

noticed in the case of *Smith v. Bowker*, 1 Mass. 80, viz., that in the case in Strange, the party who was sued by his wrong name had appeared and pleaded to the writ, and thus waived all objections that might have been taken by plea in abatement.

That distinction materially affects the case of *Crawford v. Satchwell, supra*, as an authority in cases of judgment by default.

The present case has these elements, viz.: the demand sued in the original action, upon which this execution was issued, was the debt of the present plaintiff, and the writ was in fact duly served on him, and the proceeding was intended to be against him, and the only error was in giving him a wrong Christian name. The present plaintiff did not appear, and judgment was rendered by default, and the execution was issued against the plaintiff by the wrong Christian name inserted in the writ.

Treating the case as a mere misnomer in a writ properly served upon the party, the objection is one that should have been taken by plea in abatement. In the elementary books it is said that misnomer is pleadable only in abatement: Gould's Pl. 260; 1 Ch. Pl. 440.

The view heretofore taken by this court, of mistakes like the present, has, it is quite obvious, been that if the party permitted the case to proceed to judgment and execution, without such plea in abatement, it was a waiver of the error, and the execution might be enforced against the party upon whom the original process was served. Thus in the case of *Smith v. Bowker*, 1 Mass. 76, where the party was described as Aaron Smith, of Orange, in the writ, but the same was duly served on Aaron Smith, of Athol, it was held that the officer might properly levy the execution on a judgment rendered by default thereon, upon the property of Aaron Smith, of Athol. The ground there taken was, if the party is not properly described in the writ, he should take advantage of the mistake by a plea in abatement.

In *American Bank v. Doolittle*, 14 Pick. 123, where the Christian name of a trustee was misdescribed, the court said if he had appeared, the process would have been amendable, and if he had not, he might be charged upon a *scire facias*, setting forth the facts.

In *Fitzgerald v. Salentine*, 10 Met. 437, which was an action brought on a judgment, it was said by Mr. Justice Hubbard, in delivering the opinion of the court, that if the case turned merely "upon the question of misnomer of the defendant in the original action, we should think he could not successfully de-

fend against the suit, because a mere misnomer must be pleaded in abatement." The real objection there was, that the party intended to be made such was not actually served with process at all. In *Root v. Fellows*, 6 Cush. 29, which was an action on a judgment against Fellows and — Day, omitting his Christian name, the court say the omission of the Christian name of Day was a matter which he might have pleaded in abatement, but as he suffered judgment to go against him without objection to the misnomer, an execution on that judgment issued against him on the same defective description would have been valid, and might have been legally enforced. Such seems to be the current of judicial authority as to the time and mode of taking exceptions to a misnomer, where the service is actually made on the proper party.

It may be difficult to draw the line with precision between cases which are to be held of no validity by reason of entire failure to describe the party, and those which are properly cases of misnomer, or erroneous description of a part of the name of the defendant.

The present case, it seems to us, falls clearly within the cases of mistake in the Christian name of a party, and if relied upon as a defense, should have been taken by a plea in abatement to the action, and if not taken, is waived.

If it be not so, then no occasion can exist for a plea in abatement for misnomer, for the party may always safely omit to enter his appearance, and suffer judgment to go by default, knowing that the judgment can not be enforced, and that the levy of the execution will be a trespass upon his property or person.

The cases of omissions of the middle name, which may more frequently occur, would, upon the ground taken by the counsel for the plaintiff, be fatal to the validity of a judgment by default, and if levied on the party intended to be sued, would subject the officer to an action for trespass.

The cases of *Commonwealth v. Perkins*, 1 Pick. 388, and *Commonwealth v. Hall*, 3 Id. 262, both held that the middle name is an essential part of the name, and its omission a misnomer, and a fatal defect, if properly objected to.

In cases like the present, of mere mistake in the Christian name, where there has been an actual service upon the party intended, and the debt sued for was the proper debt of the person upon whom such service was made, we think the rule a reasonable and proper one, that the party must object to the

mismother by a plea in abatement of the writ, or be taken to have waived that objection.

Any party who has been really misled by the mistake in the name set forth in the writ, and has been prejudiced thereby, may always apply to the court for a review, and a *superseideas* of any execution that may have been issued on a judgment on such process.

The ruling of the court of common pleas was correct, and a verdict was properly rendered for the defendant.

Exceptions overruled.

MISMOTHER IS MATTER OF ABATEMENT in criminal case: *Lynes v. State*, 30 Am. Dec. 557. See also *Wilberson v. State*, 53 Id. 137. So in case of a corporation plaintiff: *Bank of Utica v. Smalley*, 14 Id. 528. A defendant failing to plead a misnomer in abatement waives it: *Cleveland v. Boston etc. Sav. Bank*, 129 Mass. 30, citing the principal case and applying its doctrine. Where a writ purporting to be issued against Charles Langmaid was served on Chase Langmaid, who was the person intended, it was held that it could be taken advantage of only by plea in abatement, and that after a default the writ might be amended without notice: *Langmaid v. Pufer*, 7 Gray, 378, 380, also citing the principal case.

ARREST OF WRONG PERSON THROUGH MISTAKE IN NAME, or otherwise, liability for: See *Eanes v. State*, 44 Am. Dec. 289, discussing the question at some length.

ELLIOT v. FITCHBURG R. R. Co.

[10 Cushing, 191.]

EVERY RIPARIAN OWNER HAS RIGHT TO REASONABLE USE OF WATER in a stream flowing through his land, for domestic, manufacturing, and agricultural purposes, subject to the equal right of every other riparian owner to the same reasonable use, and is liable to owners below him only for an entire diversion or abstraction of the water in such stream, or for an unreasonable use thereof.

REASONABleness OF USE OF WATER IN STREAM by a riparian owner depends upon the quantity taken, the size of the stream, and various other circumstances.

RIPARIAN OWNER MUST SHOW ACTUAL PERCEPTIBLE DAMAGE BY DIVERSION of the water in a stream flowing through his land, by another riparian owner, before he can recover therefor.

RIPARIAN OWNER INCREASING FLOW OF WATER EQUAL TO QUANTITY TAKEN from a stream flowing through his land, by means of excavations and ditches, all constituting part of the same improvement, is not liable for a diversion to a proprietor below.

ACTION on the case for diverting water from a brook. The opinion states the case.

D. S. and W. A. Richardson, for the plaintiff.

G. F. Farley, for the defendants.

By Court, SHAW, C. J. This is an action of the case against the defendants, for diverting the water of a small brook, passing through land of the plaintiff in Shirley. The facts are briefly these: The plaintiff is the owner of certain land, and for more than sixty years a small brook, having its sources in several ponds, has, in its natural course, flowed through lands of various persons, viz., of one Clark, of one Furnin, and then through the plaintiff's land, which is about half a mile below said Clark's, and from the plaintiff's land through various other lands, to Nashua river. Said brook was in part supplied by a never-failing spring on said Clark's land, near said brook, and having its outlet into it. The defendants, pursuant to a warranty deed from said Clark, of a perpetual right and privilege to make and maintain a dam and reservoir, and draw and use the water therefrom, erected such dam across said stream, below said spring, and made said reservoir upon and about the same, and inserted a lead pipe therein, by means of which they have used and constantly taken water from said reservoir, to their depot in Shirley, and used the same for furnishing their locomotive steam-engines with water, and for other similar purposes. The defendants offered evidence tending to prove that said Clark, where said brook runs through his meadow, which is wet and springy, had cut ditches across the meadow to the brook, thereby increasing the flow of water to the brook; and it was further proved that there is no outlet for the water of said meadow except into this brook. The meadow is situate below the dam.

The plaintiff contended that if the jury were satisfied of the existence of the brook, as alleged, and the diversion of the water therefrom by the defendants, he was entitled to a verdict for nominal damage, without proof of actual damage. But the presiding judge instructed the jury that unless the plaintiff suffered actual perceptible damage in consequence of the diversion the defendants were not liable in this action. In connection with this instruction, the judge further instructed the jury that if they believed that the defendants, by excavating said reservoir and spring above the dam, or that said Clark, by digging said ditches, had increased the flow of water in said brook equal to the quantity of water the defendants had diverted therefrom, then the defendants were not liable in this action.

The whole court are of opinion that this direction was right

in both particulars. This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it, and regulate the rights of riparian proprietors through and along whose lands it passes, as are held to apply to other watercourses, subject to this consideration, that what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream, just sufficient to furnish water for domestic uses, for farm-yards, and watering places for cattle.

The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in watercourses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below, on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right.

The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character, that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it can not be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply, or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent a question of degree; still the rule is the same, that each proprietor has a right to a reasonable use of it for his own benefit, for domestic use and for manufacturing and agricultural purposes.

It has sometimes been made a question whether a riparian proprietor can divert water from a running stream, for purposes of irrigation. But this, we think, is an abstract question which can not be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor can not under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump—for the mode is not material—to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which in its ordinary operation will nearly or quite absorb the whole volume of the stream, although the relative position of the land and stream are such that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, whilst the other would nearly deprive him of the whole beneficial use; and yet, in both, the water would be used for irrigation. We cite a few of the leading cases in Massachusetts on this subject: *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Id. 420 [7 Am. Dec. 160]; *Cook v. Hull*, 8 Pick. 269 [15 Am. Dec. 208]; *Anthony v. Lapham*, 5 Id. 175.

This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors. Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration, or retardation of the natural current, it would fol-

low that each lower proprietor would have a right of action against any upper proprietor, for taking any portion of the water of the stream for any purpose; such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor in entering the close of the upper to abate it: *Colburn v. Richards*, 13 Mass. 420 [7 Am. Dec. 160].

It would also follow, as the legal and practical result, that no proprietor could have any beneficial use of the stream without an encroachment on another's right, subjecting him to actions *torties quoties*, as well as to a forcible abatement of the nuisance. If the plaintiff could, in a case like the present, have such an action, then every proprietor on the brook to its outlet in Nashua river would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimack river to the ocean. This is a sort of *reductio ad absurdum*, which shows that such can not be the rule, as was claimed by the plaintiff.

Without intending at present to state the authorities fully, we refer to the following English cases, as tending to illustrate and fix the rule as stated: *Bealey v. Shaw*, 6 East, 208; *Duncombe v. Randall*, Het. 32; *Williams v. Morland*, 2 Barn. & Cress. 910; S. C., 4 Dow. & Ry. 583; *Wright v. Howard*, 1 Sim. & St. 190.

If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below, by diminishing the value of his land, though at the time he has no mill or other work to sustain present damage, still, if the party thus using it has not acquired a right by grant, or by actual appropriation and enjoyment twenty years, it is an encroachment on the right of the lower proprietor for which action will lie: *Mason v. Hill*, 3 Barn. & Adol. 304; S. C., 5 Id. 1; *Wood v. Waud*, 3 Exch. 748. But the doctrine is much discussed and settled on deliberation, in a recent case decided in the court of exchequer: *Embrey v. Owen*, 6 Id. 353.

The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land; so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is therefore only for an ab-

straction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie; but for such deprivation or unwarrantable use, an action will lie, though there be no actual present damage. So it is subsequently stated in the close of the case last cited: "So long as this reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie."

We think the most reliable American authorities are to the same effect: 3 Kent's Com., 6th ed., 439; Angell on Water-courses, c. 4; *Blanchard v. Baker*, 8 Greenl. 253 [23 Am. Dec. 504]; *Tyler v. Wilkinson*, 4 Mason, 397; *Webb v. Portland Manufacturing Co.*, 3 Sumn. 189; *Anthony v. Lapham*, 5 Pick. 175.

The same doctrine has been held in a recent case in New York: *Van Hoesen v. Coventry*, 10 Barb. 518.

In applying these rules to the present case, we are to consider that Clark, who owned the land on which the dam was built, and the defendants to whom he conveyed all his right to the use of the water, as holding together the whole right, and it is to be considered in the same manner as if the defendants owned the land. We think it was properly left to the jury to find whether the defendants claiming in the right of Clark had, by their diversion of the water for a valuable and highly beneficial use, caused any actual or perceptible damage, and if not, to find for the defendants. It is very clear that here is no complaint of the total diversion of the stream from the plaintiff's land; no such ground of complaint is set forth or relied on. The bed of the stream and the stream itself remains and passes through the plaintiff's land as it did before. The gravamen of the complaint is, not for diverting the stream itself, but for abstracting a part of the water of the stream. This is a right which each proprietor has, if exercised within a reasonable limit. The proper question therefore was, whether, in the mode of taking, in the quantity taken, and the purpose for which it there was taken, was a reasonable and justifiable use of the water by Clark. The use being lawful and beneficial, it must be deemed reasonable, and not an infringement of the right of the plaintiff, if it did no actual and perceptible damage to the plaintiff, and therefore we think that question of fact was rightly left to the jury, who must have found that it did him no such damage.

We consider the other direction correct also, as we understand it. The question was not, if the defendants had caused

a damage to the plaintiff, amounting in law to a disturbance of his right, for which an action would lie, whether it would be barred by an advantage of equal value, conferred in nature of a set-off; but whether the improvements of Clark upon his meadow, taken together as a whole, including the dam and ditches as parts of one and the same improvement, any damage was done to the plaintiff; and this, we think, was correctly so left.

It may perhaps be proper to guard against misconstruction, in considering what are the general rights and duties of persons owning lands bounding on running streams, by the general rules of law and for general purposes, that some alterations of these rules may be effected in Massachusetts, by the acts of legislation on that subject, in respect to mills, and the construction which has been judicially put upon such legislative acts. This system originated with the provincial act, 13 Anne, passed in 1714: Ancient Laws and Charters, 404. This act by its operation necessarily secures, to some extent, advantages to the prior occupant of a stream, by a dam erected to work a mill: *Bigelow v. Newell*, 10 Pick. 348; *Bemis v. Upham*, 13 Id. 169; *Baird v. Wells*, 22 Id. 312.

It is not necessary, however, now to go into this subject, but merely to say that the rights to streams of running water, upon which the present question turns, are not dependent upon or affected by the mill acts.

Exceptions overruled.

RIGHT OF RIPARIAN OWNER TO USE OF WATER IN STREAM: See *Newhall v. Ireson*, 54 Am. Dec. 790, and the note thereto, collecting prior cases in this series. That each riparian owner on a stream has a right to the reasonable use thereof for his own benefit for domestic, manufacturing, and agricultural purposes is a point to which the principal case is cited with approval in *State v. Pottmeyer*, 33 Ind. 404, 405. So he may use the water for irrigation; but he can not, under color of that right, wholly abstract or divert the water of the stream, or use an unreasonable quantity of it: *Union M. & M. Co. v. Ferris*, 2 Saw. 193. The reasonableness of the use of the water in a stream by one riparian proprietor or mill owner does not depend on what would be deemed reasonable in his business, but upon what would be regarded as reasonable considered with respect to the rights of others: *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 245, also citing the principal case.

WHETHER PROOF OF ACTUAL DAMAGE BY DIVERSION OF WATERCOURSE is essential to enable a riparian owner to recover therefor, see *Plumleigh v. Dawson*, 41 Am. Dec. 199; *Parker v. Griswold*, 42 Id. 739; *Newhall v. Ireson*, 54 Id. 790, and notes. In *Garwood v. New York etc. R. R. Co.*, 83 N. Y. 407, the principal case is cited and distinguished on this point. So it is cited in *Lund v. New Bedford*, 121 Mass. 290, where it was held, in an action for diverting water from a mill, that wherever an act is done in violation of one's

rights, of such a nature that if it be continued an indefinite time a title by adverse possession may be acquired, an action will lie without proof of actual damage.

MORRELL v. TRENTON MUTUAL LIFE AND FIRE INSURANCE COMPANY.

[10 CUSHING, 282.]

CREDITOR OF FIRM HAS INSURABLE INTEREST IN PARTNER's LIFE, the insurance being less than the debt, and may recover the whole amount from the insurers, where the debt is due and unpaid at the death, though the estates of both partners are solvent.

PARTY INTERESTED IN ANOTHER's EARNINGS HAS INSURABLE INTEREST IN LATTER's LIFE, it seems, where the latter, for a valuable consideration, has agreed to work a year in the mines and to give the former a quarter of what he makes, and upon the loss of the insured life within the year the whole insurance money is recoverable.

Action on a policy of insurance on the life one William C. Morrell, who died within three months after the insurance was effected. The main question was as to whether or not the plaintiff had an insurable interest in the said Morrell's life. The court below ruled that he had, and was entitled to recover the full amount insured. Verdict for the plaintiff; exceptions by the defendants. The facts sufficiently appear from the opinion.

J. G. Abbott, for the plaintiff.

A. H. Nelson, for the defendants.

By Court, SHAW, C. J. The court are of opinion that, upon the facts stated, the plaintiff had an interest such as is recognized as a good insurable interest in the life of the person on which this policy was made by the defendant company to the plaintiff. He held a promissory note signed by a firm of which the said William C. Morrell was one of the partners, to an amount larger than the amount insured; this was due and owing at the time the insurance was made, at the death of the party whose life was insured, and at the time of the trial. Each partner is a debtor *in solido* to the whole amount of a joint debt. It is no answer, we think, that the estate of the deceased was solvent, and that the other joint debtor might be able to pay it; it was enough, we think, that by the contract of the defendants, made on a valuable consideration, they guaranteed to the plaintiff that if his debtor should die within the time, and the debt

remained unpaid, they would pay the amount stipulated: *Anderson v. Edie*, cited in Park on Ins. 432; *Tidswell v. Ankerstein*, Peake's Cas. 151.

But the court are strongly inclined to the opinion that the plaintiff had another interest in the life of the person on whose life he was insured by the defendants. He had a subsisting contract with that person, made on a valuable consideration, by which he was to receive one quarter part of his earnings in the mines of California for one year. Such an interest can not, from its nature, be valued or apportioned. It was an interest upon which the policy attached. By the loss of his life within the year, the person whose life was insured lost the means of earning anything more, and the plaintiff was deprived of receiving his share of such earnings, to an uncertain and indefinite amount.

Exceptions overruled.

INSURABLE INTEREST IN LIFE OF ANOTHER, NECESSITY OF.—There is some difference of opinion upon the point as to whether or not by the English common law, prior to the enactment of the statute of 14 Geo. III., c. 48, it was necessary, in order to support an insurance by one person upon the life of another, that the person insuring should have an interest in the life assured. The prevailing opinion seems to be, however, that such an interest was not necessary: *Dalby v. India etc. Life Assurance Co.*, 15 Com. B. 387; *British Commercial Ins. Co. v. Magee, Coo. & Al.* 182; *Shannon v. Nugent, Hayes*, 536; *Trenton etc. Ins. Co. v. Johnson*, 24 N. J. L. 576. And after the enactment of the statute above referred to, but before its extension to Ireland, it was there held, in the absence of any requirement on that point in the policy, that one person could effect a valid insurance for his own benefit upon the life of another in which he had no interest: *British Commercial Ins. Co. v. Magee, Coo. & Al.* 182; *Shannon v. Nugent, Hayes*, 536; Bliss on Life Ins., sec. 9.

But this question was put at rest in England by the statute of 14 Geo. III., c. 48, already mentioned, the terms of which were as follows: "Whereas it hath been found by experience that the making insurance on lives, or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming; for remedy whereof, be it enacted, etc.: That from and after the passing of this act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever. And be it further enacted: That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote. And be it further enacted: That in all

cases when the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

Although this statute is said in *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516, to have been merely declaratory of the common law, the language of the preamble of the statute shows that it was supposed by those who enacted it that they were introducing a limitation upon an existing right of free insurance upon lives and other events in which the persons effecting the insurance had no interest. Certain it is, that before the statute a common practice had grown up of making such insurances, whether lawful or not: Reynolds on Life Ins. 39.

In this country the statute of 14 Geo. III. was never in force: Bliss on Life Ins., sec. 20; but insurances upon lives in which the persons effecting the insurances have no interest are nevertheless held void as against public policy, and it is as well settled here as in England that in order to support a life insurance policy the person to whom it is issued must have an insurable interest in the life insured: Bliss on Life Ins., secs. 7, 9; 3 Kent's Com. 388; 12 West. Jur. 707; *Lord v. Dall*, 7 Am. Dec. 38; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516; *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419; *Gilbert v. Moose's Adm'r*, 13 Week. Not. Cas. 489; S. C., 13 Ins. L. J. 297; *Fox v. Penn. Mut. Life Ins. Co.*, 4 Big. Ins. Rep. 458; *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. Rep. 249; *Mowry v. Home Life Ins. Co.*, 9 R. I. 348. A policy unsupported by such an interest is a mere wagering policy, and "it is not lawful for a man to bet upon the life of another party any more than it is lawful to bet on anything else:" Sharswood, J., in *Fox v. Penn. Mut. Life Ins. Co.*, 4 Big. Ins. Rep. 458. To permit one person to take out a policy of insurance, for his own benefit, on the life of another where he has no interest in the preservation of that life is almost tantamount to offering a premium for murder. At all events, it puts in the way of the beneficiary a temptation to imagine and long for, if not to contrive, the death of the person whose life is insured. Contrary to the general doctrine of the American cases on this subject, it is said in *Trenton etc. Ins. Co. v. Johnson*, 24 N. J. L. 576, that, by the rule of the common law prevailing in New Jersey, an interest in the life assured, on the part of the person effecting the insurance, is not necessary to support a life insurance policy; but the decision in that case in favor of the policy was not rested on that ground.

WHAT CONSTITUTES INSURABLE INTEREST IN ANOTHER'S LIFE.—I.
Whether Interest must be Pecuniary.—It is undoubtedly settled in England that, under the statute of 14 Geo. III., c. 48, the interest in another's life which will support a life insurance policy must be pecuniary: Angell on Ins., sec. 298; Bliss on Life Ins., sec. 10; Reynolds on Life Ins. 41; *Halford v. Kymer*, 10 Barn. & Cress. 724; *Hebdon v. West*, 3 Best & S. 579. Indeed, this may, we think, be safely laid down as the doctrine upon this subject both in England and America: May on Ins., sec. 104; Angell on Ins., sec. 299; 1 Cent. L. J. 603; *Lord v. Dall*, 7 Am. Dec. 38, 40, and note discussing this question at considerable length; *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 104; S. C., 3 Ins. L. J. 123, 126; *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419; *Singleton v. St. Louis etc. Ins. Co.*, 66 Id. 63; S. C., 27 Am. Rep. 321, and note; S. C., 7 Rep. 148; S. C., 7 Ins. L. J. 578; S. C., 18 Alb. L. J. 103; *Continental Life Ins. Co. v. Volger* (Ind.), 13 Ins. L. J. 142; S. C., 18 Cent. L. J. 229, and note; S. C., 17 Rep. 553; *Rombach v. Piedmont etc. Ins. Co.* (La.), 16 Rep. 780; S. C., 12 Ins. L. J. 268. Mere relationship,

therefore, does not constitute an insurable interest: *Continental Life Ins. Co. v. Volger*, 13 Ins. L. J. 142; S. C., 18 Cent. L. J. 229, and note; S. C., 17 Rep. 553. It must be admitted, however, that in some of the American authorities there are strong expressions to the effect that the interest to support such a policy need not be pecuniary, and that an interest arising from close relationship may be sufficient: *Bliss on Life Ins.*, sec. 21; *Grattan v. National Life Ins. Co.*, 15 Hun, 74; *Insurance Co. v. Bailey*, 13 Wall. 619.

"The tendency of the American decisions, especially the more recent ones," says Mr. Bliss, "is to hold that wherever there is any well-founded expectation of or claim to any advantage to be derived from the continuance of a life, there is an insurable interest in the life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity:" *Bliss on Life Ins.*, sec. 21. In *Grattan v. National Life Ins. Co.*, 15 Hun, 76, where it is held that an interest arising from relationship may be sufficient, the court say: "If it appear that the relation, whether of consanguinity or of affinity, was such between the person whose life was insured and the beneficiary named in the policy as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured, such interest will uphold the policy." Mr. Justice Clifford, in *Insurance Co. v. Bailey*, 13 Wall. 619, after remarking that an insurable interest in the thing insured is essential to support a marine or fire policy, says: "Life insurances have sometimes been construed in the same way; but the better opinion is, that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui que vie* are founded in an erroneous view of the nature of the contract; that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured."

In a subsequent well-considered case in the same court, Mr. Justice Field, delivering the opinion, states with great force what constitutes an insurable interest in another's life: *Warnock v. Davis*, 104 U. S. 775; S. C., 13 Rep. 737; S. C., 11 Fed. Rep. 527; S. C., 4 Morr. Trans. 93. In that case he says: "It is not easy to define with precision what will in all cases constitute an insurable interest so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party

taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event."

If we correctly understand the doctrine here laid down, it amounts simply to this, that an insurable interest in another's life need not be pecuniary in the sense of being susceptible of definite "pecuniary estimation," nor in the sense of being founded upon any mere pecuniary relation, but that it may rest solely upon ties of blood or affinity, and yet that the mere existence of such a tie is not of itself sufficient to constitute an insurable interest, but that the tie must be such as to give reasonable ground for an expectation of benefit or advantage from the continuance of the life. By "benefit or advantage," in this connection, we understand that it must be a material or physical "benefit or advantage." That is to say, a mere sentimental benefit arising from a gratification of the affections by the prolongation of the life assured will not suffice. The expected benefit must consist in service, maintenance, or the like. This is equivalent to saying that it must be a pecuniary benefit, as distinguished from a mere sentimental or moral gratification. Thus understood, the doctrine of these cases, which professedly reject the test of pecuniary interest, is not substantially different from that held in other cases. If it were true that the reasonable expectation of advantage from the continuance of another's life, required to constitute an insurable interest in that life, had reference in any case solely to the satisfaction of an affectionate desire for the prolongation of the life, ought not the insurers to be permitted to show in defense that there was in fact no affection between the parties? And on the other hand, ought not an insurable interest to be held to exist wherever there is affection, though there was no other relation? Yet we venture to say, on the one hand, that the right of a husband to insure his wife's life would not be denied even if it should be distinctly proved that he never had the slightest affection for her, and uniformly treated her as a mere household drudge; and on the other hand, that where there was no tie giving a reasonable ground to expect service or support, a friendship as warm and abiding as that between Damon and Pythias would not furnish an insurable interest in behalf of one in the life of the other. For a further discussion of this point, see the note to *Lord v. Dall*, 7 Am. Dec. 42, heretofore referred to.

2. *Direct and Definite Legal Interest not Necessary.*—Certainly where there is a clear legal title to a pecuniary benefit from the continuance of another's life, there is an insurable interest in that life; but a strict legal claim to such benefit is not essential; a strong probability of it is enough: *Miller v. Eagle etc. Ins. Co.*, 2 E. D. Smith, 268; *Hoyt v. New York Life Ins. Co.*, 3 Bosw. 448. "The interest required need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life:" *Trenton etc. Ins. Co. v. Johnson*, 24 N. J. L. 586. An equitable claim to a pecuniary advantage from the continuance of the life will suffice, it seems: *Miller v. Eagle etc. Ins. Co.*, 2 E. D. Smith, 292.

3. *If Claim of Interest in Insured Life is Mere Pretext*, the plaintiff having no interest which he would reasonably desire to have protected, or if his interest is small and the amount of the insurance vastly disproportionate, the policy will be regarded as a mere gaming contract, and not enforceable: *Mowry v. Home Life Ins. Co.*, 9 R. I. 346; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; S. C., 22 Am. Rep. 180; S. C., 5 Ins. L. J. 835; S. C., 8 Chic. L. N. 382; *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. Rep. 249. And it is for the jury to determine whether the insurance is a mere cover for a wager on the life assured: *Brockway v. Mutual Benefit Life Ins. Co.*, *supra*.

INSURABLE INTEREST IN ANOTHER'S LIFE ARISING FROM CONTRACT RELATIONS.—1. *Insurable Interest of Creditor in Debtor's Life.*—It is well settled that a creditor has an insurable interest in the life of his debtor, at least to the amount of the debt: Angell on Ins., sec. 304; May on Ins., sec. 108; Reynolds on Life Ins. 54; Bliss on Life Ins., sec. 13; 18 Cent. L. J. 346; *Godson v. Boldero*, 9 East, 72; *Drysdale v. Piggott*, 22 Beav. 238; *Van Lindenau v. Desborough*, 3 Car. & P. 353; S. C., 8 Barn. & Cress. 586; *Succession of Hearing*, 26 La. Ann. 326; *Rawls v. American etc. Ins. Co.*, 27 N. Y. 282; *Rivers v. Gregg*, 5 Rich. Eq. 274; *McKenty v. Universal Life Ins. Co.*, 3 Ins. L. J. 385 (U. S. C. C., D. of Minn.); *Union Mut. Life Ins. Co. v. Mowry*, 7 Ins. L. J. 203 (U. S. S. C.); *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. Rep. 249. And the creditor may insure the debtor's life without the latter's consent: *Succession of Hearing*, 26 La. Ann. 326. The theory upon which an insurable interest in a debtor's life is held to exist in favor of his creditor is that the prospect of payment of the debt is presumed to be increased by the continuance of the debtor's life. Besides, although this does not seem to be adverted to in the cases, the debtor's life at common law furnished a direct security for his debt, owing to the creditor's right to take his body in execution. It must be confessed, however, that the theory that a creditor has an interest in the continuance of his debtor's life is, as Mr. Bliss very clearly shows, to a considerable extent fictitious: Bliss on Life Ins., sec. 13. Take, for instance, a case where the debt is fully secured, or a case where the debtor is so hopelessly insolvent that the chances of payment are more remote than the chances of his death: what interest, in either of those cases, has the creditor in the continuance of his life? Indeed, in the latter case, is not the creditor's interest, as soon as he effects the insurance, directly adverse to the prolongation of the debtor's life?

The debt must undoubtedly be valid to give the creditor an insurable interest. Hence the holder of a note given for money won at play has no insurable interest in the debtor's life: *Dwyer v. Edie*, Angell on Ins., sec. 296; 2 Park. Ins., 7th ed., 639. Nor does a mere moral claim constitute one a creditor, it seems, so as to give him an insurable interest in the life of the person against whom he has the claim: *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; S. C., 22 Am. Rep. 180; S. C., 5 Ins. L. J. 841; S. C., 8 Chic. L. N. 382. But the fact that a debt is barred by the statute of limitations does not deprive the creditor of an insurable interest in the debtor's life, because the bar is not absolute and the debtor may not avail himself of it: *Rawls v. American etc. Ins. Co.*, 27 N. Y. 282. So where the debtor is an infant, for he may not interpose infancy as a defense: *Rivers v. Gregg*, 5 Rich. Eq. 274; Bliss on Life Ins., sec. 13.

As to the extent to which a creditor may effect insurance on his debtor's life, Mr. Bliss is of opinion that upon principle there is no reason why he may not insure in excess of his debt if the insurers choose to take the risk in return for the premium paid, and if there is no fraud or misrepresentation: Bliss on Life Ins., sec. 31. And no doubt this is true unless the disproportion between the interest assured and the amount of the insurance is so great as to make the policy a mere wagering contract, in which case, of course, the reasons against the enforcement of the agreement are as cogent as if there were no insurable interest at all: *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. Rep. 249; *Guardian etc. Ins. Co. v. Hogan*, 80 Ill. 35; S. C., 22 Am. Rep. 180; S. C., 5 Ins. L. J. 841; S. C., 8 Chic. L. N. 382; see also *Cammack v. Lewis*, 15 Wall. 643. Thus where an insurance for forty thousand dollars was effected for the benefit of a creditor for a trifling sum, who held,

however, a pretended claim for ten thousand dollars, it was left to the jury to say whether the transaction was *bona fide* or a mere wagering contract. *Brockway v. Mutual Benefit Life Ins. Co.*, *supra*. In *Cammack v. Lewis*, 15 Wall. 643, it was said that a creditor holding a claim for only seventy dollars could not take an insurance on his debtor's life for three thousand dollars, either directly or by an assignment, through an arrangement with his debtor; but the point was not decided because the controversy there was between the creditor and the representative of the debtor. Of course where the creditor has a further indeterminate interest beyond the extent of his debt, by reason of a partnership with his debtor, in a business requiring considerable capital and skill, an insurance largely in excess of the debt will be valid: *Union Mut. Life Ins. Co. v. Mowry*, 7 Ins. L. J. 203 (U. S. S. C.)

The effect of the provision in the statute of 14 Geo. III., c. 48, heretofore quoted, limiting the right of recovery on a life policy to the extent of the insurable interest, is no doubt practically to prohibit insurances by creditors or others in excess of the insurable interest, even if they would be otherwise valid. As to the extent of recovery on such a policy, however, see a subsequent section of this note.

Not only has a creditor an insurable interest in the life of his debtor, but it has been decided that he may have a similar interest in the life of the debtor's wife under some circumstances. Where a debtor and his wife joined in an assignment to the creditor by way of security of a certain annuity and legacy coming to the wife, an insurance effected by the creditor on the wife's life was held valid: *Henson v. Blackwell*, 4 Hare, 434; S. C., 14 L. J. Ch. 329. The reason given was that the security consisting in *chores in action* belonging to the wife which could not be reduced to possession if the wife should survive the husband, they would inure to her, and the security would be gone; but as Mr. Bunyon clearly shows in criticising this decision the risk consisted in the wife's living and not in her dying, so that the creditor's interest was really adverse to the continuance of her life: *Bunyon on Life Ins.* 290.

2. *Insurable Interest of Debtor in Creditor's Life*.—It may well happen that a debtor may have such an interest in the continuance of his creditor's life as to render valid a policy taken out by him on such life; but a mere promise of the creditor not to enforce his claim while he lives will not give the debtor an insurable interest in his life: *Hebdon v. West*, 3 Best & S. 579.

3. *Annuitant has Insurable Interest* in the life on which the annuity depends; for here there is an obvious advantage to be derived from the continuance of the life: *Reynolds on Life Ins.* 62; as where one borrows money and grants an annuity for his own life as part consideration for the loan: *Gottlieb v. Cranch*, 4 De G. M. & G. 440. And in such a case, the borrower, on paying the debt, is not entitled to a surrender of the policy: *Id.*

4. *Partner has Insurable Interest in Copartner's Life* on very clear grounds, one of the most obvious of which is that the partnership will be terminated by death. Where a partner has not paid in his proportion of the capital stock, there is still greater reason for holding that his copartner has an insurable interest in his life: *Connecticut Mutual Life Ins. Co. v. Luchs*, 108 U. S. 498; S. C., 12 Ins. L. J. 577; S. C., 17 Cent. L. J. 130; S. C., 16 Rep. 420. So where the partner whose life is insured is to devote his personal attention and skill to the partnership business: 18 Cent. L. J. 347. In those mining partnerships where, as in the principal case, one furnishes the outfit to send another to the mines to engage in mining, with an agreement that they are to share the earnings, the home partner has an undoubted insurable interest in

the mining partner's life, for the whole income of the investment depends upon that: *Bevin v. Connecticut Mutual Life Ins. Co.*, 23 Conn. 244; *Miller v. Eagle etc. Ins. Co.*, 2 E. D. Smith, 268; *Hoyt v. New York Life Ins. Co.*, 3 Boew. 440. See also *Trenton etc. Ins. Co. v. Johnson*, 24 N. J. L. 576.

5. *Joint Obligors in Bond have Insurable Interest* in each other's lives to the extent to which each is liable as among themselves, under the statute of 14 Geo. III.: *Branford v. Saunders*, 25 Week. Rep. 650. So a surety in a note has an insurable interest in his principal's life, but the insurance money, so far as not required to indemnify the surety, must be applied to payment of the debt, where the insurance is effected with the privity of the principal: *Lea v. Hinton*, 5 De G. M. & G. 823. The insurable interest in cases of this sort stands on the same foundation as a creditor's insurable interest in his debtor's life.

6. *Insurable Interest of Master and Servant in Each Other's Lives.*—Where a servant is hired at a certain salary for a specified time, he has an insurable interest for that period in the master's life: *Hebdon v. West*, 3 Best & S. 579; May on Ins., sec. 109; 18 Cent. L. J. 347. So an apprentice has an insurable interest in the master's life: 12 West. Jur. 706. So a master or employer may undoubtedly have an insurable interest in his servant's or employee's life, whether such servant be bond or free: *Miller v. Eagle etc. Ins. Co.*, 2 E. D. Smith, 292; *Summers v. United States etc. Trust Co.*, 13 La. Ann. 504; *Woodfin v. Asheville etc. Ins. Co.*, 6 Jones L. 558. Thus, where a member of a mining association employs a substitute to represent him and work in his stead in the mines, he has an insurable interest in the latter's life: *Trenton etc. Ins. Co. v. Johnson*, 24 N. J. L. 576. So a manager may insure the life of an actor engaged by him: Bliss on Life Ins., sec. 14.

7. *Tenant has Insurable Interest in Landlord's Life*, where the latter is himself only a tenant for life, because the term depends upon the continuance of the life: *Sides v. Knickerbocker Life Ins. Co.*, 16 Fed. Rep. 650 (U. S. C. C. W. D. Tenn.).

8. *Insurance Company has Insurable Interest* in a life insured by it, and may reissue in another company to protect itself: *Dalby v. India etc. Life Assurance Co.*, 15 Com. B. 385.

9. *Insurable Interest of Trustee.*—An executor in trust has an insurable interest in the life of one who has granted an annuity for his own life to the testator, which the latter has bequeathed to other persons, because, as ruled by Lord Kenyon, the executor can not assent to the legacy until the debts are paid without being guilty of a *devastavit*, and all the testator's interest vests in the executor: *Tidswell v. Ankerstein*, Peake, 204. In that case the will directed the executor to insure. No doubt, also, a valid life policy may be issued to one as trustee for another, both names appearing on the face of the policy, although the trustee has no interest in the life assured if the *cestui que trust* possesses such interest: *Collett v. Morrison*, 9 Hare, 162; S. C., 21 L. J. Ch. 878. An assignee in bankruptcy has, it seems, no insurable interest in the life of the bankrupt, especially after the latter's discharge: *In re McKinney*, 15 Fed. Rep. 535 (U. S. D. C. S. D. N. Y.)

INSURABLE INTEREST FOUNDED ON RELATIONSHIP.—1. *Interest Founded on Relation of Parent and Child.*—In this country, a father undoubtedly has an insurable interest in his minor child's life, owing to his right to such child's services: Bliss on Life Ins., sec. 24; May on Ins., sec. 105; 18 Cent. L. J. 347; *Loomis v. Eagle etc. Ins. Co.*, 6 Gray, 396; *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; *Grattan v. National Life Ins. Co.*, 15 Hun, 74; S. C., 7 N. Y. Week. Dig. 384. And in the case last cited it was held that a policy issued to a

father upon his son's life was valid, though the son came of age before the loss happened. So a mother has an insurable interest in her son's life: *Reef v. Union Life Ins. Co.*, 17 Ins. Chron. 13; 18 Cent. L. J. 347. In England, under the statute of 14 Geo. III., it was held, in *Halford v. Kymer*, 10 Barn. & Cress. 724, that a father had no insurable interest in the life of his son where the latter was nearly of age at the time of the insurance. The same doctrine was taken for granted in *Worthington v. Curtis*, L. R., 1 Ch. Div. 419; S. C., 45 L. J. Ch. Div. 259; S. C., 33 L. T., N. S., 828, where the point was not necessary to be decided, because the insurance money had been paid, and the contest was between the father and certain creditors of the son claiming that the money belonged to the latter's estate, but the court decided in favor of the father. In that case the son seems to have been of age. Where children are legally liable for the maintenance of parents in case the latter become indigent, it would seem clear, upon principle, that parents have an insurable interest in the lives of their children, whether infants or adults. The fact that the parents are not in fact indigent, and do not need support at the time of the insurance, can make no difference.

So, a father being liable for the maintenance of his infant children, the latter certainly have an insurable interest in the former's life. But the case is not so clear as to the insurable interest of an adult child in the life of his father. In *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; S. C., 22 Am. Rep. 180; S. C., 5 Ins. L. J. 835; S. C., 8 Chic. L. N. 382, it was held that an adult son had no insurable interest in his father's life where they were living apart in independent circumstances, unless the son could show some reasonable expectation of pecuniary advantage from the continuance of the father's life. On the other hand, in *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. St. 154; S. C., 22 Am. Rep. 741; S. C., 5 Ins. L. J. 649, it was held that an adult son had an insurable interest in the life of his father, not only because of the relationship, but because the son would be liable, under the poor law, for the father's support if he should become indigent, and therefore should be permitted to provide for his reimbursement for any such outlay. The court say: "It would be technical in the extreme to say that a son had no insurable interest in his father's life. Poverty may overtake the father in his life-time, and thus both father and mother be cast upon the son; or if the father die before her, the necessity may fall at once upon the son. Why, then, should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best of feelings of our nature, and on a legal duty which may arise at any time." The reasoning of this case is entirely at variance with the generally received doctrine that to constitute an insurable interest in another's life there must be a reasonable expectation of benefit or advantage from the continuance of that life. The fact that a father might become a burden upon his son if he lived would certainly seem to hold out very little prospect of benefit or advantage, in any pecuniary sense, from the continuance of the father's life. By the same statute, however, to which the court referred in that case, it was provided that parents should maintain their indigent children. This, together with the possibility, adverted to in the decision, that if the father died the mother's support might be cast upon the son, perhaps furnishes a sufficient interest in the continuance of the insured life to support the policy. In *Continental Life Ins. Co. v. Volger*, 13 Ins. L. J. 144 (Ind.); S. C., 18 Cent. L. J. 229; S. C., 17 Rep. 553, it was held that a daughter

had no insurable interest in her mother's life by virtue of the relationship, but must show a pecuniary interest.

2. *Insurable Interest of Husband and Wife in Each Other's Lives.*—Certainly a husband has an insurable interest in the life of his wife, because of his right to her services and society: *Bliss on Life Ins.*, sec. 12; 18 Cent. L. J. 347; *Hebborn v. West*, 3 Best & S. 579; S. C., 9 Jur., N. S., 747; S. C., 32 L. J. Q. B. 85, *per Wightman, J.*; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 460; S. C., 6 Ins. L. J. 383; though the contrary is stated in *Bunyon on Life Ins.* 14. So a wife unquestionably has an insurable interest in her husband's life, because of his liability for her maintenance: *Bliss on Life Ins.*, sec. 25; *May on Ins.*, sec. 107 b; 1 Cent. L. J. 602; 18 Id. 347; *Reed v. Royal Exchange Ass. Co.*, Peake Add. Cas. 70; *Connecticut Mut. Ins. Co. v. Schaefer*, 94 U. S. 460; S. C., 6 Ins. L. J. 383; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *Charter Oak Life Ins. Co. v. Brant*, 47 Id. 419; *Gambs v. Covenant Mut. Life Ins. Co.*, 50 Id. 44; *St. John v. American Mut. Life Ins. Co.*, 2 Duer, 429; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 287; nor will a subsequent divorce avoid the policy: *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 460; S. C., 6 Ins. L. J. 383; so though the decree allows the wife alimony: *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*. In *Equitable Life Ass. Soc. v. Paterson*, 41 Ga. 338, it was held that a woman living with a man as his wife had an insurable interest in his life, though they were not legally married, she having another husband living. The decision was put on the ground that the pretended husband in fact supported the woman and treated her as his wife, and she therefore had a deep interest in the continuance of his life. Besides, the alleged husband himself effected the insurance. In *Holabird v. Atlantic Ins. Co.*, 2 Ins. L. J. 588; S. C., 2 Dill. 166, note, it was held, however, that to maintain an action on a policy taken out by a wife on her husband's life, the insurable interest being put in issue, it must appear that the plaintiff was a lawful wife. A woman has an insurable interest also in the life of a man who is under a promise of marriage to her, because of her right to prospective support in case the contract is fulfilled: *Chisholm v. National etc. Life Ins. Co.*, 52 Mo. 213; S. C., 14 Am. Rep. 414. But this is said, in a valuable article in 18 Cent. L. J. 347, to be carrying the principle too far. It seems to us, however, that the insurable interest, in a pecuniary sense, is even stronger in such a case than in that of a wife taking an insurance upon her husband's life. If a husband, who is able to support his wife, dies, his wife receives her share of his estate. But if a promised husband dies, the woman whom he has promised to marry receives nothing. Her claim upon him is entirely dependent on the continuance of his life. Besides, as a mere matter of affection, it often happens that a woman takes a warmer interest in a man before she marries him than she does afterwards.

3. *Insurable Interest Dependent on Other Relations.*—A man has no insurable interest in the life of his brother, if there is no pecuniary interest superadded to the relationship: *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100, 104; S. C., 3 Ins. L. J. 123, 126. Otherwise where the brother who effects the insurance is also a creditor of him whose life is insured: *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 7 Id. 862; S. C., 18 Alb. L. J. 217. A sister dependent for support on a brother, who stands *in loco parentis* to her, has an insurable interest in his life: *Lord v. Dall*, 7 Am. Dec. 38. And see *Etna Life Ins. Co. v. France*, 94 U. S. 561; S. C., 6 Ins. L. J. 331; S. C., 15 Alb. L. J. 450. An uncle has no insurable interest, by virtue of relationship only, in the life of his nephew: *Singleton v. St. Louis Mut. Life Ins. Co.*, 68

Mo. 63; S. C., 27 Am. Rep. 321; S. C., 7 Ins. L. J. 576; S. C., 18 Alb. L. J. 103. A step-son has no insurable interest in the life of his step-father's father: *Gilbert v. Moose's Adm'r*, 13 Ins. L. J. 297; S. C., 41 Leg. Int. 75. A son-in-law has no insurable interest in the life of his mother-in-law: *Rombach v. Piedmont etc. Ins. Co.*, 16 Rep. 780 (La.); S. C., 12 Ins. L. J. 268. In some cases it would probably require a very strong pecuniary motive to interest a man in favor of the continuance of the life of his mother-in-law. Under a statute authorizing insurances on lives of members of the "same family" for each other's benefit, it has been held that a girl residing with an unmarried man, who had no immediate relatives, as a member of the same domestic circle, being regarded and treated by him as his daughter, was a member of the same family so as to have an insurable interest in his life: *Carmichael v. Northwestern Mut. Ben. Ass.*, 13 Id. 12 (Mich.). But where a keeper of a hotel and bar agreed with an habitual drunkard to give him a home as long as he lived, knowing that he could not live long, and then effected a large insurance on his life, it was held that the person whose life was assured was not a member of the beneficiary's "family" within the statute, and that the policy was a mere wagering contract, and void: *Mutual Benefit Ass. v. Hoyt*, 46 Mich. 473.

ONE MAY INSURE HIS OWN LIFE or any part of it, that is to say, for a longer or shorter period, and may make the insurance money payable to whom he pleases, whether such person has any interest in his life or not, provided it be not done pursuant to an arrangement between the parties at the expense and for the benefit of the person designated as beneficiary, as a cover for a mere wagering contract: Reynolds on Life Ins. 46; Bliss on Life Ins., secs. 17, 26; 18 Cent. L. J. 347; *Wainewright v. Bland*, 1 Moo. & R. 481; S. C., 2 Hurlst. & N. 42; S. C., 26 L. J. Ex. 266; S. C., 2 Big. Ins. Rep. 428; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 460; S. C., 6 Ins. L. J. 386, *per Bradley*, J.; *Etna Life Ins. Co. v. France*, 94 U. S. 561; S. C., 6 Ins. L. J. 331; S. C., 15 Alb. L. J. 450; *Langdon v. Union Mut. Life Ins. Co.*, 14 Fed. Rep. 272; *Provident Life Ins. Co. v. Baum*, 29 Ind. 236; *Franklin Life Ins. Co. v. Seston*, 53 Id. 382; *Connecticut Life Ins. Co. v. Volger*, 13 Ins. L. J. 145 (Ind.); S. C., 18 Cent. L. J. 229; *Succession of Hearing*, 26 La. Ann. 328; *Campbell v. New England etc. Ins. Co.*, 98 Mass. 381; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 287; *Olmsted v. Keyes*, 85 Id. 593; S. C., 13 N. Y. Week. Dig. 121; *Hogle v. Guardian Life Ins. Co.*, 6 Robt. 567; *American Ins. Co. v. Robertshaw*, 26 Pa. St. 189; *Fairchild v. North Eastern Mut. Life Ass. Co.*, 51 Vt. 613, 624. The insurable interest which one has in his own life is what supports the policy in such a case. So two or more persons may effect an insurance on their joint lives for the benefit of the survivor, the interest of each in his own life upholding the policy: *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 460; S. C., 6 Ins. L. J. 386, *per Bradley*, J. But where it appears that a policy issued to one on his own life, payable to his executors, was really effected by or on behalf of another person having no interest in the life, who furnished the funds, and was to have the sole benefit of the insurance, by assignment or otherwise, the policy is void: *Shilling v. Accidental Death Ins. Co.*, 2 Hurlst. & N. 42; S. C., 26 L. J. Ex. 266; S. C., 2 Big. Ins. Rep. 428; *Wainewright v. Bland*, 1 Moo. & R. 481; S. C., 1 Mee. & W. 32; S. C., Tyrw. & G. 417. But where a policy was taken out by a brother on his own life for his sister's benefit, though she paid some of the premiums, the policy was held valid: *Etna Life Ins. Co. v. France*, 94 U. S. 561; S. C., 6 Ins. L. J. 331; S. C., 15 Alb. L. J. 450. And where the beneficiary pays the premiums, it is held in *Fairchild v. North Eastern Mut. Life Ass. Co.*, 51

Vt. 613, 624, that in the absence of proof to the contrary, it will be presumed that he paid them as agent for the assured. It is for the jury to determine in a case of this kind whether the transaction was *bona fide* or was a mere wager on the life assured by the person named as beneficiary: *Langdon v. Union Mut. Life Ins. Co.*, 14 Fed. Rep. 272; *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Id. 249.

ASSIGNABILITY OF POLICY TO ONE HAVING NO INTEREST IN LIFE.—It is a much debated question whether, where a life insurance policy was valid in its inception, being supported by a sufficient insurable interest, it may be afterwards, before a loss happens, assigned to one who has no interest in the life assured. The authorities on this point are in irreconcilable conflict. In the following cases it is held that such an assignment if made *bona fide*, and not prohibited by the policy, is valid: *Palmer v. Merrill*, 52 Am. Dec. 782, and note; *St. John v. American etc. Ins. Co.*, 2 Duer, 419; S. C., 13 N. Y. 31; *Valton v. National Fund Life Ins. Co.*, 20 Id. 32; *Olmsted v. Keyes*, 85 N. Y. 593; S. C., 13 N. Y. Week. Dig. 121; *Hogle v. Guardian Life Ins. Co.*, 6 Robt. 567; *Succession of Hearing*, 26 La. Ann. 326; *Clark v. Allen*, 11 R. I. 439; S. C., 17 Am. L. Reg., N. S., 83, and note; *Fairchild v. North Eastern Mut. Life Ass. Co.*, 51 Vt. 613, 624; *Ashley v. Ashley*, 3 Sim. 149. In the following cases the contrary is held: *Warnock v. Davis*, 104 U. S. 775; S. C., 4 Morr. Trans. 93; S. C., 11 Fed. Rep. 527; *Langdon v. Union Mut. Life Ins. Co.*, 14 Id. 273 (U. S. C. C. E. D. Mich.); *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116; S. C., 13 Am. Rep. 313; S. C., 7 Ins. L. J. 180; *Franklin Life Ins. Co. v. Seston*, 53 Ind. 380, explaining *Hutson v. Merrifield*, 51 Id. 24; *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kan. 93; S. C., 26 Am. Rep. 761; *Busye v. Adams*, 16 Rep. 489 (Ky.); *Stevens v. Warren*, 101 Mass. 564; *Gilbert v. Moose's Adm'r*, 41 Leg. Int. 75 (Penn.); S. C., 13 Ins. L. J. 297. The ground upon which those cases favoring such assignments proceed is that life insurance policies stand on the same footing as other choses in action, and that if valid when made there is no reason why they may not be assigned. Those cases holding the contrary view go upon the ground that if it is against public policy to permit one to effect an insurance upon a life in which he has no interest, precisely the same objection exists against allowing an assignment to one having no interest in the life; and that what can not be done directly ought not to be suffered to be done indirectly. Of course where the policy is taken originally in the name of the person whose life is insured with an intent to assign it to a stranger who pays the premiums merely as a matter of speculation, the policy is void: *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. Rep. 249. And of this the jury are to judge: Id. Where one holding a policy on his own life, payable to his executors, became bankrupt, it was held that no more than the surrender value of the insurance passed to his assignee: *In re McKinney*, 15 Fed. Rep. 535. For a discussion of the subject of assignments of insurance policies generally, see the note to *New York Life Ins. Co. v. Flack*, 56 Am. Dec. 747.

CESSATION OF INSURABLE INTEREST.—In the noted case of *Godsall v. Boldre*, 9 East, 72, where a creditor of Mr. Pitt effected an insurance on his life, and after Mr. Pitt had died insolvent a friend stepped in and furnished the money to pay the debt, it was held that the creditor having received payment, his insurable interest was gone, and he could not enforce the policy. The contract was held to be one of indemnity merely, and there could be no recovery if the creditor had suffered no loss. The case of *Godsall v. Boldre* was overruled, however, by *Dalby v. India etc. Life Ass. Co.*, 15 Com. B. 365, where it was decided that if a life insurance policy taken by a creditor on his

debtor's life was valid in its inception, the subsequent cessation of the creditor's insurable interest would not invalidate it, and that the contract was not one of indemnity merely, as in cases of marine and fire insurance, but was a contract to pay a certain sum of money upon the death of the person whose life was insured, in consideration of the annual premiums. This view of the contract is approved in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 463; S. C., 6 Ins. L. J. 383; *Trenton etc. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Hoyt v. New York Life Ins. Co.*, 3 Bosw. 446; *Miller v. Eagle etc. Ins. Co.*, 2 E. D. Smith, 294; *Grattan v. National Life Ins. Co.*, 15 Hun, 76; *St. John v. American etc. Ins. Co.*, 13 N. Y. 31; *Olmsted v. Keyes*, 85 Id. 598; *Mowry v. Home Life Ins. Co.*, 9 R. I. 354. If an insurable interest exists at the inception of the contract, but is afterwards determined by payment of the insuring creditor, or the like, the policy may nevertheless be enforced unless there is some provision therein to the contrary: *Bliss on Life Ins.*, sec. 30; *Grattan v. National Life Ins. Co.*, 15 Hun, 76; *Sides v. Knickerbocker Life Ins. Co.*, 16 Fed. Rep. 650; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; S. C., 6 Ins. L. J. 383; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *Law v. London etc. Life Policy Co.*, 1 Kay & J. 223; as where the tenant of life tenant insures the latter's life, and his own term expires before the death of the life tenant: *Sides v. Knickerbocker Life Ins. Co.*, 16 Fed. Rep. 650. So in the case, heretofore mentioned, where a wife insures her husband's life, and is divorced before a loss happens: *Connecticut Mut. Life Ins. Co. v. Schaefer*, and *McKee v. Phoenix Ins. Co.*, *supra*. "Of course a colorable and merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred:" *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*.

EXTENT OF RECOVERY.—Under the statute of 14 Geo. III., heretofore quoted, the right to recover on a life insurance policy is limited to the amount of the insurable interest at the making of the contract: *Bliss on Life Ins.*, sec. 31. And where two policies are taken out in different companies, founded on the same insurable interest, a recovery on one of the full amount of that interest bars a recovery on the other: *Hebdon v. West*, 3 Best & S. 579; S. C., 9 Jur., N. S., 747; S. C., 32 L. J. Q. B. 85; S. C., 7 L. T., N. S., 854. In this country, the general rule is that a life policy is regarded as a valued policy, especially where the insurable interest is of indeterminate value, and the amount of the insurance is the measure of recovery, if there is no bad faith, unless the over-insurance is, as heretofore stated, so great as to render the contract a mere wager, when, of course, it is wholly void: *May on Ins.*, sec. 114; *Bliss on Life Ins.*, sec. 31; *Bevin v. Connecticut Mutual Life Ins. Co.*, 23 Conn. 244; *Trenton etc. Insurance Co. v. Johnson*, 24 N. J. L. 581; *Hoyt v. New York Life Ins. Co.*, 3 Bosw. 440; *St. John v. American Mut. Life Ins. Co.*, 2 Duer, 419; *Miller v. Eagle etc. Ins. Co.*, 2 E. D. Smith, 268; *Grattan v. National Life Ins. Co.*, 15 Hun, 77.

Where a creditor insures his debtor's life, or takes from the latter a policy procured by him in his own name, for a sum largely in excess of the debt, as where the debt is seventy dollars and the insurance three thousand dollars, as between the creditor and the debtor's estate the insurance will be treated as a security or indemnity only, and the creditor receiving payment from the insurers of the full amount insured must account to the debtor's estate for all over what is necessary to pay the debt: *Cammack v. Lewis*, 15 Wall. 643. So where a debtor insures his life for the creditor's benefit for an amount exceeding the debt, the residue inures to the benefit of his estate: *American etc. Ins. Co. v. Robertshaw*, 26 Pa. St. 189. Where an insurance is taken on the debt-

or's life by a creditor, at the debtor's expense, under circumstances showing it is intended as a security, if the debt is paid before a loss the policy must be surrendered to the debtor: *Courtenay v. Wright*, 2 Giff. 337.

PLAIDING AND PRACTICE AS TO INSURABLE INTEREST IN ANOTHER'S LIFE. The insurable interest required to support a policy of insurance on another's life, or the facts from which the interest is inferred, must be averred and proved: *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35; S. C., 5 Ins. L. J. 835; S. C., 22 Am. Rep. 180; *Continental Life Ins. Co. v. Volger*, 13 Ins. L. J. 144, 145; S. C., 18 Cent. L. J. 229; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516. Proof of the insurable interest need not be made, however, as part of the preliminary proofs, unless required by the policy: *Miller v. Eagle etc. Ins. Co.*, 2 E. D. Smith, 268.

JACOBS v. POLLARD.

[10 CUSHING, 287.]

WRONG-DOERS CAN NOT HAVE REDRESS OR CONTRIBUTION AGAINST EACH OTHER, upon being held liable for the unlawful act, but this rule is confined to cases where the person claiming redress knew, or must be presumed to have known, that the act was unlawful.

PERSON UNLAWFULLY SEIZING CATTLE DAMAGE-FEASANT MAY RECOVER PROCEEDS from the officer selling them at his instance in an action for money had and received, where he has been compelled to pay a judgment in trespass, recovered against himself and the officer jointly for such seizure, by the true owner, if the parties acted in good faith in making the seizure.

Assumption for money had and received, to recover the proceeds of certain cattle. It appeared that the plaintiff seized the cattle while alleged to be damage-feasant, and delivered them to the defendant as field-driver, who, at his instance, sold them at auction and received the proceeds. The true owner of the cattle having recovered a judgment in trespass for their value and costs against the plaintiff and defendant jointly for the seizure, an execution issued on the judgment was levied on the plaintiff's property, and he paid the amount thereof. The judge being in doubt whether the plaintiff could recover, the plaintiff submitted to a nonsuit, which was to be set aside if the whole court should be of opinion that he could recover.

B. F. Butler, for the plaintiff.

G. F. Farley, for the defendant.

By Court, BIGELOW, J. It was supposed at the trial of this cause, that the facts relied on by the plaintiff to maintain his action brought it within the familiar and well-established rule of law that there can be no contribution or indemnity among

tort-feasors. But upon consideration of the principle upon which this rule is founded, and the authorities bearing upon it, we are of opinion that it does not apply to the case at bar.

It is undoubtedly the policy of the law to discountenance all actions in which a party seeks to enforce a demand originating in a willful breach or violation, on his part, of the legal rights of others. Courts of law will not lend their aid to those who found their claims upon an illegal transaction. No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those with whom, or by whose authority, such unlawful act was committed. But justice and sound policy, upon which this salutary rule is founded, alike require that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only when a person knows, or must be presumed to know, that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights, or a willful ignorance and disregard of those rights, which deprives a party of his legal remedy in such cases. It has, therefore, been held that the rule of law that wrong-doers can not have redress or contribution against each other is confined to those cases where the person claiming redress or contribution knew, or must be presumed to have known, that the act for which he has been mulcted in damages was unlawful. Lord Kenyon, in the leading case of *Merryweather v. Nixan*, 8 T. R. 186, suggests this distinction, which the recent cases have more fully developed, and the rule is now always held subject to the limitation above stated: *Betts v. Gibbins*, 2 Ad. & El. 57, 65; *Pearson v. Skelton*, 1 Mee. & W. 504; *Adamson v. Jarvis*, 4 Bing. 72; *Wooley v. Balte*, 2 Car. & P. 417; *Humphrys v. Pratt*, 2 Dow & C. 288; 2 Saund. Pl. & Ev., 2d ed., 413, 414; *Coventry v. Barton*, 17 Johns. 142 [8 Am. Dec. 376]; *Avery v. Halsey*, 14 Pick. 174. See also *Battersey's Case*, Winch. 48.

There is nothing in the facts of the present case from which it can fairly be inferred that the parties to this suit willfully committed the original trespass, with a knowledge, either actual or to be presumed, that they were thereby violating the rights of the owner of the cattle. They seemed to have acted in good faith in seizing and selling the cattle for the purpose of assert-

ing a legal right in the plaintiff to take them on his land damage-feasant, and to commit them to the defendant as field-driver, who, *virtute officii*, was supposed to have the right to sell them under the plaintiff's authority. Although in these proceedings the parties grossly misconceived their legal rights and remedies, and committed an aggravated trespass on the property of a third person, yet it does not appear that they acted wantonly with an intent to infringe on the rights of the owner of the beasts. Their only error was in the mode of enforcing their own rights, and being thereby guilty of an encroachment upon the rights of another. Upon the principles already stated, therefore, it is quite clear that there is nothing in the transaction to deprive either of the parties to this suit of their legal remedies against each other. There can be no doubt that the present defendant, if he had not received the proceeds of the sale of the cattle and retained them in his possession, and had been compelled to pay the amount of the judgment in the action of trespass, could have well maintained his suit against the present plaintiff for indemnity or contribution. The same rule applies, now that the parties are reversed. The defendant has in his hands the proceeds of the cattle which he seized and sold by the order and as agent of the plaintiff. The plaintiff has paid the judgment recovered in the action of trespass in full, and thereby relieved the defendant from all liability on account thereof. He can now, therefore, well maintain an action for money had and received, to recover of the defendant the proceeds of the sale of the cattle, as money in his hands, which, in equity and good conscience, belongs to the plaintiff. Such recovery must, of course, be subject to such reasonable deductions therefrom as will compensate the defendant for his costs and charges incurred in consequence of committing the act of trespass by the authority and request of the plaintiff. The action being an equitable one, the plaintiff can be allowed to recover only what, under all the circumstances, is justly due.

It was urged by the defendant that this action could not have been maintained by the plaintiff against the defendant immediately after the sale of the cattle and the receipt of the proceeds by the defendant, and therefore it can not be maintained now. Admitting, for the sake of the argument, the correctness of the first branch of this proposition, we do not think the latter follows as a legitimate conclusion from it. The relations of the parties have changed by the payment by the plaintiff of the judgment in the action of trespass; until such payment, the de-

fendant might have claimed to hold the proceeds as an indemnity against the claim for damages made by the owner of the cattle. He had then no money in his hands which equitably belonged to the plaintiff. The payment of that judgment by the plaintiff has not only relieved the defendant from all liability, but has vested in the plaintiff an equitable right to the proceeds of the sale of the cattle.

Nonsuit taken off.

NO CONTRIBUTION BETWEEN JOINT TRESPASSERS: See *Cumpston v. Lester*, 51 Am. Dec. 442.

STEVENS v. BEALS.

[10 CUSHING, 291.]

NOTE MADE PAYABLE TO FEME COVERT IS HUSBAND'S ABSOLUTE PROPERTY
WIFE INDORSING IN HER OWN NAME NOTE MADE PAYABLE TO HER DURING
COVERTURE passes a good title if it be done with the husband's assent; otherwise not.

AVERTMENT THAT NOTE WAS INDORSED BEFORE SUIT IN DECLARATION
thereon is not to be considered in determining that fact, because it is not
evidence.

Assumpsit on a note by an indorsee against the maker. The note was on its face made payable to one Lydia H. McFarland, or order, she being a *feme covert* at the time, and was indorsed by her in her own name. There was evidence tending to show that the note was for a loan made to the defendant out of money given to Mrs. McFarland by her husband at marriage; that the note was written by the husband; that he had given his full assent to his wife's doing as she pleased with it as her own; and that the defendant had frequently promised her to pay it. The judge ruled that the indorsement, if made with the husband's assent, was valid, and that the jury might consider the allegation in the declaration that the note was indorsed before suit, in determining whether it was so indorsed. Verdict for the plaintiff. Exceptions by the defendant.

B. F. Butler, for the plaintiff.

J. G. Abbott, for the defendant.

By Court, BIGELOW, J. Two objections only have been insisted on by the defendant in support of the exceptions in this case. The first relates to the authority of the wife, upon the facts reported, to indorse the note in suit in her own name, and

thereby vest a good title thereto in the plaintiff. There can be no doubt that the note, having been given after marriage and during coverture, although payable to the wife, was the absolute property of the husband, and he could pass the title thereto by his own sole indorsement. The authorities in this country are concurrent to this point: Bingham on Inf. & Cov 213, note. We think it is equally clear that a note made payable to the wife during coverture, when indorsed by the wife in her own name, with the assent and authority of the husband, passes by a good title to an indorsee; but that without such assent and authority, no title passes by her indorsement. The cases all turn upon this distinction. In the leading case of *Barlow v. Bishop*, 1 East, 432, which decides that a married woman can not indorse a note made payable to her in her own name, so as to pass a valid title thereto, proof of the authority or assent of the husband was wanting. Subsequent decisions have fully recognized this distinction; and it is now the well-settled rule of law that the assent or authority of the husband gives validity to the wife's indorsement, and enables her to pass a good title to choses in action made payable to her during coverture. The principle upon which this distinction rests is this: the coverture of the wife creates an incapacity and disability in her to make a valid contract. The assent of the husband removes this disability or supplies the want of capacity. She then becomes to a certain extent the agent of the husband, who is bound by her acts when done in pursuance of the authority conferred by him: Ch. Bills, 21, 200, 201; 2 Bright on Husband and Wife, 42; *Cotes v. Davis*, 1 Camp. 485; *Prestwick v. Marshall*, 7 Bing. 565; S. C., 4 Car. & P. 394; *Prince v. Brunalle*, 1 Bing. N. C. 435; *Miller v. Delamater*, 12 Wend. 433.

The case of *Savage v. King*, 17 Me. 301, which was cited and relied on by the defendant, is in conflict with the other authorities upon this point. The court put their decision in that case mainly upon the authority of *Barlow v. Bishop*, 1 East, 432, without adverting to the distinction created by proof of the assent of the husband to the indorsement, which seems to have escaped the attention both of the counsel and the court. We can not, therefore, yield our assent to the authority of that case.

It was urged by the counsel for the defendant, as a strong argument against the recognition of the rule of law giving effect to the wife's indorsement, when assented to and authorized by the husband, that it might in some cases operate very greatly

to the prejudice of the rights of a promisor. The argument was this: the note being given to the wife during coverture, the property in it vests absolutely in the husband, and he can sue in his own name upon it; the indorsement of the note by the wife in her name, *ex proprio vigore*, would pass no title to it; and therefore the recovery by the indorsee of the wife would be no bar to another recovery by the husband, unless the promisor could show the assent of the husband to her indorsement, which he might not be able to do, because the wife, in an action by the husband on the note, could not be called by the promisor as a witness to prove it. But it seems to us that this argument entirely overlooks the effect of a recovery on the note by the indorsee of the wife. The rule of law being that such indorsement is inoperative without the husband's assent and passes no title to the indorsee, a recovery by such indorsee necessarily implies the husband's assent and authority, without which no recovery on it could have been had. The indorsement, therefore, of the wife, under such circumstances, is equivalent to that of the husband. Her act becomes in law his act. The person recovering a judgment as indorsee on such a note must claim through her husband by a title derived from him and in privity with him. He thereby becomes bound by the judgment recovered against the promisor, who can well plead it in bar in a suit brought on the same note against him by the husband.

In the case at bar, the authority and assent of the husband of the payee to the wife's indorsement were abundantly proved, and the instructions of the court upon this part of the case were entirely correct and in conformity with the authorities above cited.

The other objection upon which the defendant relies is to that part of the instructions of the court in which the jury were directed that they might take into consideration the fact that the note was described by the plaintiff's attorney in the declaration, as having been indorsed to the plaintiff, in deciding the question whether the note was in fact indorsed before suit brought. It is quite obvious that this instruction was erroneous. One of the facts in dispute between the parties upon which the jury were to pass was, whether the note in suit was indorsed by the payee before the commencement of the suit. The instruction of the court went to the extent of allowing the jury to weigh as evidence, in determining a fact, the statement of that fact made by the pleader in drawing the declaration. The mere

sverment of a party in his own favor was thereby substituted for proof. It is manifest that this ruling was a violation of the elementary principles of evidence governing the trial of cases in a court of law. Upon this point, therefore, it is necessary to sustain the exceptions and send the case to a new trial.

Exceptions sustained.

HUSBAND'S RIGHT TO CHSES IN ACTION MADE OR PAYABLE TO WIFE before or after marriage: See *Boozer v. Addison*, 46 Am. Dec. 43, and note discussing the subject at considerable leng'.h: *Leabry v. Maupin*, 47 Id. 120; *Weeks v. Weeks*, Id. 358; *Fisk v. Cushman*, 52 Id. 761, and notes. In *Allen v. Wilkins*, 3 Allen, 321, 322, the doctrine of the principal case that a note made to a married woman during coverture belongs to her husband is explained to mean that the husband has the *jus disponendi* so long as they both live, but it is held that if the husband dies without reducing the chose to possession or doing any act indicating an intent to appropriate it during the wife's life, her administrator may sue on it.

INDORSEMENT BY WIFE OF NOTE PAYABLE TO HER, validity and effect of: See the note to *Boozer v. Addison*, 46 Am. Dec. 51. The doctrine of the principal case on this point is approved and followed in *Slawson v. Loring*, 5 Allen, 342.

SCRIPTURE v. LOWELL MUTUAL FIRE INS. CO.

[10 CUSHING, 336.]

FIRE INSURANCE POLICY COVERS DAMAGE BY IGNITION AND EXPLOSION OF GUNPOWDER in an insured building.

FIRE INSURANCE POLICY DOES NOT COVER DAMAGE BY OVERHEATING, without combustion, by the unskillful use of fire in a factory. *Per Cushing, J., arguendo.*

FIRE INSURANCE POLICY DOES NOT COVER LOSS BY LIGHTNING, without the exhibition of fire. *Per Cushing, J., arguendo.*

FIRE INSURANCE POLICY DOES NOT COVER LOSS BY EXPLOSION OF STEAM or other agent acting by expansion without combustion. *Per Cushing, J., arguendo.*

Assumption on a policy of insurance against fire on the plaintiff's house. Judgment for the plaintiff upon an agreed statement in the common pleas, and the defendants appealed. The case appears from the opinion.

A. R. Brown, for the plaintiff.

I. S. Morse, for the defendants.

By Court, CUSHING, J. The case finds that a burning match being applied, without fault of the plaintiff, to a cask of gunpowder in the attic of his house, the gunpowder took fire, exploded, set fire to a bed and clothing, charred and stained

some of the wood-work, and blew off the roof of the house; and the only question in the case is, whether the loss thus occasioned to the building is covered by the conditions of an ordinary policy against fire. The question may be generalized thus: By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion and in part of explosion. Is the whole damage covered by a policy insuring "against loss or damage by fire"?

The very anomalous case of *Austin v. Drewe*, 6 Taunt. 436, has been adduced in argument, and greatly relied upon, as having apparent analogy to this; but when that case is examined, the analogy disappears. The evidence there was, of a building of several stories, in each of which sugar, in a certain state of preparation, was deposited for the purpose of being refined; and a chimney running up through the building formed almost one whole side of each of the stories; and by means of this chimney heat was communicated to the several rooms containing the sugar, and thus acted on it chemically. At the top of the chimney was a register, used to shut in the heat during the night. The servant of the assured, in lighting the fires in the morning, neglected to open the register, in consequence of which undue heat came out into the heating-room, and the sugars were thereby injured. And the action pending was to recover damage for this under a policy of insurance against loss by fire. As reported in 6 Taunt. 436, the opinion of the court is as follows: Gibbs, C. J., says: "I think no loss was sustained by any of the risks in the policy. The loss was occasioned by the extreme mismanagement of their register by the plaintiffs." And Dallas, J., says: "The only cause of the damage appears to me to have been the unskillful management of the machinery by the plaintiffs' own servants, and it is therefore not a loss within the meaning of the policy." The case is also reported in 2 Marsh. 130; and there the language of the court is somewhat different. There Chief Justice Gibbs says: "The damage was occasioned by the unskillful management of the machinery, and not by any of those accidents from which the defendants intended to indemnify the plaintiffs." And Dallas, J., says: "There was nothing on fire which ought not to have been on fire, and the loss was occasioned by the carelessness of the plaintiffs themselves." The conflicting and imperfect reports of this case have led to various and contradictory misapprehensions of its import. On the one hand, it has been supposed that the decision in *Austin v. Drewe* is put on the ground of carelessness of servants

(compare Hughes on Ins. 507-511), and is thus in apparent contradiction with the decision of *Dobson v. Sothbey, Moo. & M.* 90, in which Lord Tenterden says that "one of the great objects of insuring is security against the negligence of servants and workmen"—which doctrine is now, in regard to fire policies at least, the well-settled law both in Great Britain and the United States: 1 *Phill. on Ins.*, c. 13, sec. 2, p. 1049.

Another authority supposes the point decided to have been, that "in order to recover upon a policy against loss or damage by fire, it is not sufficient to show that the property has been damaged by the heat of fires usually employed in manufacture, and incurred by the negligence of the insured or his servants, beyond its usual intensity:" Ellis on Ins. 25. This construction of the case of *Austin v. Drewe* is inexact; for it does not plainly indicate that the real question in controversy was of damage to the subject-matter of manufacture.

On the other hand, the decision in *Austin v. Drewe* has been assumed to establish that, "to bring a loss within the risk insured against it must appear to have been occasioned by actual ignition, and no damage occasioned by mere heat, however intense, will be within the policy:" 2 *Marsh. on Ins.*, 3d ed., 790. This proposition is not the point of the case; and it can not be sound law; for it may well happen that serious damage, within the scope of a fire policy, shall be done to a building or to its contents by the action of fire in scorching paint, cracking pictures, glass, furniture, mantel-pieces, and other objects, or heating and thus actually destroying many objects of commerce, and yet all this without actual ignition—that is, visible inflammation.

All these manifest errors, and the doubts they throw over the case of *Austin v. Drewe*, are dispelled at once by the report of it in Holt, 126, and in 4 Camp. 360, as it was tried at *nisi prius*. There it appears that the claim was for damage to the sugars by overheating only. And Chief Justice Gibbs said: "I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture was going on. Nothing was consumed by fire. The plaintiffs' loss arose from the negligent management of their machinery. The sugars were chiefly damaged by the heat. And what produced the heat? Not any fire against which the company insured, but the fire for heating the pans, which continued all the time to burn without any excess. The servant forgets to open the register, by which the smoke ought to have escaped and the

heat to have been tempered." And when one of the jurymen suggested that fires arising from negligence of servants were covered by fire policies, Chief Justice Gibbs assented, and said it was not the case of a fire arising from negligence, for there was no fire except where it ought to have been; but it was the case of the damage of an article in the process of manufacture by the unskillful management of the fire used as an agent of the manufacture: *Austin v. Drewe*, 4 Camp. 360; S. C., Holt N. P. 126.

If, in *Austin v. Drewe*, the fire had been where it ought not to be, if, even with careless management, it had burned the building, and notwithstanding it was fire maintained only for the purpose of manufacture, then all the observations of the court go to show that, in this instance, as in that of the whale-ship mentioned in *Emerigon*, 1 Tr. de Ass. 436, the insurers would have been held to be liable for the loss. This, therefore, and this only, as correctly stated by Beaumont, Ins. 37, is decided by the case of *Austin v. Drewe*, namely, that where a chemist, artisan, or manufacturer employs fire as a chemical agent, or as an instrument of art or fabrication, and the article, which is thus purposely subjected to the action of fire, is damaged in the process by the unskillfulness of the operator, and his mismanagement of heat as an agent or instrument of manufacture, that is not a loss within a fire policy. This we apprehend is good sense and sound law. But it does not touch at all the present case.

It has been thought proper thus to analyze the case of *Austin v. Drewe*, because having been variously reported by four different reporters, and presenting itself prominently in several of the text-books, but in nearly all of them with more or less of misconception, it has become the starting point, in legal construction, of conflicting lines of argument leading to sundry false conclusions, and among others, that of a supposed application to the present question.

Some adjudications have also been cited of questions arising in the contingency of damage done by lightning. Thus, in *Kenniston v. Merrimack County Mut. Ins. Co.*, 14 N. H. 341 [40 Am. Dec. 193], the supreme court of New Hampshire decided that damage by lightning, without any combustion to indicate the presence of fire, is not within the terms of a policy against "fire by accident, lightning, or by any other means;" the court, in a brief opinion, deducing the conclusion from the assumed premises that lightning *per se* is not fire. The same conclusion,

upon similar facts and upon the same words of insurance, "fire by lightning," is elaborately reasoned out in a recent case in New York, *Babcock v. Montgomery County Insurance Company*, 6 Barb. 637, where it is held, that to constitute a loss within the policy, there must be fire, or burning, and that damage by lightning in other forms is not the risk intended by the contract; because, though caloric may generate electricity, or electricity caloric, yet caloric and electricity are distinct things in nature.

The principle adjudged in the cases of this class will be readily seen by reversing the question. Suppose, not as fact but as mere supposition, a policy insuring against damage done through electricity generated by caloric. Obviously, this would not cover damage done by fire only, electricity not being evolved. So, in the actual case reported, of insurance against fire produced by lightning, if the effects be of lightning only, without exhibition of fire, it would not, according to the above decision, be within the policy. Or, suppose insurance on cattle against the risk of death by fire alone. In that assumption, if the cattle die, as they may, by a stroke of lightning, without a burn or any other action of fire on their bodies, it would not be the risk contemplated by the contract: Beaumont on Ins. 37.

The question of loss by lightning is very summarily disposed of in the older authorities by treating electricity as fire from heaven: See 1 Emerigon, c. 12, sec. 17, No. 1, and the authors there cited. But the progress of knowledge has led to juster notions of the nature of lightning, and of course to different conclusions touching its legal relations; which are correctly summed up by a late writer as follows, namely, that fire includes lightning if there be any mark of fire; but not otherwise: Beaumont on Ins. 37.

These cases of damage by lightning bear on the present question, therefore, if at all, only by very distant analogy. Neither of them covers it, or has any direct relation to it. To the contrary of this, in New York, at least, the same courts which decide that loss by lightning merely is not covered by a fire policy, decide that loss by the explosion of gunpowder is. There is a series of cases precisely in point, which expressly decide, or by implication assume, that damage done by the explosion of gunpowder ignited within a building, as well as that done by its combustion, is within the risk of a fire policy. The case of *Grim v. Phoenix Insurance Company*, 13 Johns. 451, was this: A vessel insured against fire was partly laden with gunpowder, which being ignited by carelessness, the vessel was blown up

and totally lost. It was argued by eminent counsel, and the opinion was given by Thompson, C. J.; and throughout the cause it seems to be assumed that the loss was, in respect to its cause, within the policy, and the decision was made to depend on other considerations. The same conclusion is also assumed in the case of *Duncan v. Sun Fire Insurance Company*, 6 Wend. 488 [22 Am. Dec. 539]. In the case of *City Fire Insurance Company v. Corlies*, 21 Wend. 367 [34 Am. Dec. 258], the claim was on a fire policy for merchandise destroyed, not in burning, but through the blowing up of the building wherein it was stored, by means of gunpowder; and the court expressly adjudged this to be "a loss by the peril insured against within the meaning of the policy." The same point has been ruled incidentally by the supreme court of the United States: *Waters v. Merchants' Louisville Insurance Company*, 11 Pet. 225. Perhaps it may add a little to the weight of these authorities to say that the same thing as to loss by gunpowder—*sulphureo pulvere accenso*—seems to have been holden by the older commercial jurists in Europe: *Straccha de Assec.*, el. 18.

This court, to be sure, is not bound by the decisions or opinions cited, but they are entitled to great consideration; and there is not, so far as we know, any contrary adjudication or opinion. Uniformity of decision is in itself a desirable thing. The question, we admit, is a nice one. Upon careful reflection, however, we have come to the conclusion that the received opinions on the subject, and the adjudications referred to, are in accordance with reason and principle. It seems not to be denied that actual combustion, produced by the ignition of gunpowder, is within the present policy. If, then, a combustible substance, in the process of combustion, produces explosion also, it is not easy to perceive why, of the two diverse but concurrent results of the combustion, the one should be ascribed to fire any less than the other. The plain fact here is, the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff.

Our opinion excludes, of course, all damage by mere explo-

sions, not involving ignition and combustion of the agent of explosion, such as the case of steam, or any other substance acting by expansion without combustion: See *Perrin's Administrator v. Protection Insurance Co.*, 11 Ohio, 146 [38 Am. Dec. 728]. It likewise excludes all damage occasioned but remotely or consequentially through the agency of gunpowder, such as injury done to a house by falling fragments in the blasting of rocks, or the shattering of a house by the stroke of a cannon-ball, in which examples the shock of a projectile, and not ignition or combustion, is the proximate cause of the damage done. We recognize and accept, in the full force of its application, the maxim, *In jure non remota causa sed proxima spectatur*: Bacon's Max. 1.

The legal relations of marine insurance have been copiously discussed in many express treatises of elaborate erudition, and are considered in a great number of judicial decisions, in which the whole subject has been explored with wonderful acuteness and comprehension of logic and of learning; while fire insurance, as a branch of legal knowledge, is, comparatively speaking, in its rudiments. The cases on marine insurance throw little if any light on the present question, except in so far as they attempt to prescribe a rule for distinguishing between what is remote and what is proximate cause. The conclusion reached in this discussion, as may be seen by the latest investigation of the point in Great Britain, *Montoya v. London Assurance Co.*, 6 Exch. 451, is, that while for most cases it is practicable to draw the line and to formalize a rule between the two classes of causes, yet in other cases, according to the general law of nature, the two classes approach and run into one another until the distinction vanishes; and within the limits of this debatable land of differences it is necessary to apply judicial discretion to the particular questions as they arise, just as it is in the not infrequent inquiry whether a thing, or the use or measure of it, be reasonable or not. In *Montoya v. London Assurance Co.* it was determined that where the lower part of a cargo is damaged by sea-water, and by the evolution of gases from the part thus damaged, or the propagation of heat arising from fermentation, the superior part of the cargo be damaged also, the loss on the latter is by the perils of the sea, the involvement of the secondary effect in the primary one being an example of *causa proxima*.

In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate

or remote; for the agent is one and the same throughout, namely, fire. The *causa* was burning powder; the *causa causans* was a burning match; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning. Yet fire is the agent at each of these distinct stages of causation. Suppose there was a barrel of sulphur in the plaintiff's attic, instead of gunpowder; and this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once as a case of fire. It does not change the legal relation of causes to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder when ignited consumes with more of rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house.

On the other hand, cases are conceivable other than by the use of gunpowder, of explosion without any combustion, which nevertheless, being the result of the action of fire, are still, it would seem, within the range of the general principle. Various mineral substances exist, of value in commerce and the arts, which explode by the action of the fire without either ignition or combustion. In general, any close vessel, of whatever material composed, when filled with an expansive fluid, is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens, under certain conditions, to some forms of wood; which, although combustible, may by the action of fire explode without ignition; or which, as in the present case, of a house, by having compressed within it some burning substance, which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part and in part of explosion.

If, however, the question of consequential damage needed to be explored for the determination of the present case, it would serve to confirm the conclusion to which we have, on other premises, arrived. Thus, in Great Britain, damage which occurs consequentially in the case of a fire, by reason of confusion of mind, as in throwing fragile objects out of the window; or by sudden terror from alarm, as in leaving open the tap of a barrel, and thus wasting the contents, is held to be loss by fire,

according to the usages of insurance offices or established legal principle: Beaumont on Ins. 41. So it is in the case of a beam, cornice, or covering removed to prevent the spread of conflagration: *Id.* We understand the same to be the rule, in the case, for instance, of a fire in the upper story of a building, and the destruction or damage of goods in a lower story, not by fire, but by the water thrown into or upon the building for the purpose of extinguishing the fire. All these are fit illustrations of the question of merely consequential damage. Its legal relations may likewise be followed in the familiar case of the squib, falling on a party's premises, and by him hastily thrown off, and so falling upon the premises of another, and thus giving rise to the inquiry, whether the first throwing or the second throwing should be taken as the responsible cause: *Scott v. Shepherd*, 2 W. Black., 2d ed., 892, and notes; S. C., 3 Wils. 403.

In the hypothesis that fire is to be regarded as *causa proxima* in the present case, we can see but one supposable defect, namely, the suggestion that though it be conceded that the explosion of burning gunpowder, and its effects, are the action of fire, yet this particular effect on the building is not exhibited in the form of igneous action. The cases above supposed, of the shriveling of some masterpiece of pictorial art, the cracking or discoloration of a rich vase or gem, the bursting of a cask of wine through the expansion of its contents, these, it may be said, are distinctly cases of damage, without ignition, it is true, but by the direct and specific action of heat as such; while it is denied that such is the fact in the present case of the blowing up of a dwelling-house by the ignition of gunpowder. We do not think the premises of this argument are sustained by the physical facts which occurred. If they were so, then the nearest analogy would be of damage by smoke, that is, the moisture thrown off by burning wood, and carrying with it ashes, empyreumatic oil, and other constituent parts of the wood, either in their natural condition or transformed by the process of combustion. Now, it is obvious that mere smoke, without any direct action of heat, may do great damage to many kinds of merchandise, such as delicate textile fabrics, esculent vegetables, articles of taste, and other numerous objects; and if a dwelling or a magazine take fire, and some parts of it only be consumed, but the contents of apartments, to which the actual fire does not extend, are nevertheless damaged by the smoke penetrating into and filling them, can it be doubted that the dam-

age thus done is a loss within the ordinary conditions of a fire policy? *Semble, per Gibbs, C. J., arguendo*, in *Austin v. Drewe*, Holt N. P. 127. Yet, incontestably, damage by smoke is an effect, which is not in itself igneous action, though it be the result thereof; while, as we conceive, the explosion of gunpowder is igneous action.

In conclusion, we think the rule, which we propose for the present case, reconciles all the conditions involved in the question; is conformable to the nature of things; and constitutes a coherent and consistent doctrine, namely, that where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or of explosion, or of both combined. In either case, the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against loss by fire.

Judgment for the plaintiff.

Loss by FIRE, WHAT DEEMED TO BE, UNDER FIRE INSURANCE POLICY: See the note to *Hillier v. Allegheny etc. Ins. Co.*, 45 Am. Dec. 657, where this subject is discussed at length. As to loss by explosion of gunpowder, see *City Fire Ins. Co. v. Corkies*, 34 Id. 258, and note. As to loss by explosion of a steam boiler, see *Millaudon v. New Orleans Ins. Co.*, 50 Id. 550. As to damage by lightning without combustion, see *Kenniston v. Merrimack County Mut. Ins. Co.*, 40 Id. 193.

WORCESTER CO. BANK v. DORCHESTER AND MILTON BANK.

[10 CUSHING, 488.]

BURDEN OF PROOF IS NOT ON HOLDER OF BANK BILL STOLEN before issuance, it seems, to show that he came by it fairly, in an action against the issuing bank; but it is otherwise as to a stolen note or bill of exchange.

HOLDER OF BANK BILL STOLEN BEFORE ISSUANCE, RECEIVING IT BONA FIDE, in the usual course of business, for value, may recover on it against the bank though he was guilty even of gross negligence in taking it, there being no evidence of fraud.

Assumpsit on a certain bill purporting to have been issued by the defendants' bank. It appeared from an agreed statement that the bill in question was never issued by the defendants, but was stolen before issuance, but after it was fully prepared for circulation; that notices of the robbery were published in several papers, one of which was taken by one of the plaintiffs' directors, and that notices were also posted in various places

and sent to all the New England banks. It was agreed that the plaintiffs' cashier would testify that although he could not remember having received this particular bill, he had no doubt that he received it in the due course of business, as cashier, and paid full value for it; that the bill was afterwards returned to him, as cashier, by a correspondent bank as a discredited bill; that he knew of no reason why it should have been so returned if it had not been sent by his bank for redemption; that he had no recollection of ever having seen it before its return; that he never received any previous notice of a refusal to redeem any of the defendants' bills, or any notice of the robbery in question, or saw any posted notice thereof; that if any notice had been received by the plaintiffs, he would have been likely to know it; that before his appointment as cashier, he recollects seeing in one or more papers a newspaper paragraph mentioning the robbery, but he thought it was not an advertisement; that he had seen notices of arrests for the robbery, but did not remember hearing of the arrest or conviction of the person who committed the robbery, though the defendants' cashier would testify that such arrest and conviction were notorious facts.

J. J. and M. S. Clarke, for the plaintiffs.

A. Churchill, for the defendants.

By Court, METCALF, J. It is well settled in this commonwealth that in a suit by the holder of a promissory note or bill of exchange, which has been stolen, or which has otherwise been fraudulently put into circulation, the burden is on the plaintiff to prove that he came fairly into possession of it, under such circumstances as entitle him to recover: *Munroe v. Cooper*, 5 Pick. 412. And it was contended by the counsel for the present defendants, in his learned and able argument, that the same rule of evidence is to be applied to the case of a stolen bank bill. We doubt this, but need not decide the point now. For, assuming that the burden is on the plaintiffs to prove that they fairly obtained the bill in suit, yet we are of opinion, upon the evidence submitted to us, that they have sustained that burden, and are entitled to recover. We can not doubt that their cashier received the bill in the usual course of business, and for a valuable and full consideration. And though he seems not to have exercised great vigilance, yet we perceive in his conduct nothing like fraud or gross negligence. It does not appear that he had any notice, which he was bound to regard, that the defendants had been robbed. The only notice of that fact, which

he remembers with any certainty, is, that he saw it stated in a newspaper paragraph.

It was once held that in a case of a bill of exchange or promissory note fraudulently put into circulation, the holder must show that he had used due and reasonable caution in taking it. But it has since been definitely adjudged that if he took it in good faith, he is entitled to recover on it; and that even gross negligence in him is not tantamount to fraud, although it may be given in evidence to a jury, as tending to prove fraud. The burden of proving good faith is all the burden which the law imposes on him: *Goodman v. Harvey*, 4 Ad. & El. 870; S. C., 6 Nev. & M. 372; *Uther v. Rich*, 10 Ad. & El. 790; S. C., 2 Per. & Dav. 579; 2 Greenl. Ev., sec. 639; 3 Kent's Com., 7th ed., 98, note; Ch. Bills, 10th Am. ed., 257; Byles on Bills, 2d Am. ed., 143, 148. In *Arbouin v. Anderson*, 1 Ad. & El., N. S., 504, Lord Denman said: "Acting upon the case of *Goodman v. Harvey*, which gives the law now prevailing on this subject, we must hold that the owner of a bill [of exchange] is entitled to recover upon it, if he has come by it honestly; and that that fact is implied *prima facie* by possession; and that to meet the inference so raised, fraud, felony, or some such matter must be proved."

According to these authorities, the plaintiffs must have judgment, even upon the rule of evidence which the defendants would apply to them.

Judgment for the plaintiffs.

HOLDER OF STOLEN BANK BILL OR OF BANK BILL FRAUDULENTLY OBTAINED, RIGHTS OF: See the note to *New Hope D. B. Co. v. Perry*, 52 Am. Dec. 449. That the holder of a bank bill stolen from the issuing bank may recover on it against the bank, if he received it *bona fide* for value in the due course of business, is a point upon which the principal case is cited and approved in *Burson v. Huntington*, 21 Mich. 437; *Spooner v. Holmes*, 102 Mass. 508. The burden of proof of want of good faith is on the bank: *Wyer v. Dorchester etc. Bank*, 11 Cush. 53; and proof that he took the bill with knowledge of suspicious circumstances will not suffice, unless it amounts to proof of want of good faith: *Spooner v. Holmes*, *supra*.

HOLDERS OF STOLEN NEGOTIABLE INSTRUMENTS GENERALLY, RIGHTS OF: See *Beltzhoover v. Blackstock*, 27 Am. Dec. 330; *Vairin v. Johnson*, 28 Id. 125; *Marsh v. Small*, 48 Id. 452, and cases cited in the notes thereto. See also, as to when the holder of a note must show that he came by it fairly, *Snyder v. Riley*, 47 Id. 452. As to who is a *bona fide* holder of a note or bill, see *Russell v. Hadduck*, 44 Id. 693, and note. That the burden of proof is on the holder of a negotiable note or bill stolen or fraudulently put into circulation to show, in an action against the maker, that he received it in good faith for value before maturity, is a point to which the principal case is cited in

Clark v. Thayer, 105 Mass. 218. The case is cited and distinguished on the same point in *Wyer v. Dorchester etc. Bank*, 11 Cush. 53. That a *bona fide* holder of stolen negotiable paper, transferable by delivery or indorsed in blank, receiving it for value in due course of business, may recover on it, is a point to which the principal case is cited in *Atlantic Bank v. Merchants' Bank*, 10 Gray, 560, *per Merrick, J.*, dissenting; *Brooklyn etc. R. R. Co. v. National Bank*, 102 U. S. 40.

BARNARD v. BARTLETT.

[10 Commw., 501.]

MAXIM THAT "EVERY MAN'S HOUSE IS HIS CASTLE" applies to arrests in civil but not in criminal actions.

OFFICER WITH CRIMINAL PROCESS MAY BREAK AND ENTER DEFENDANT'S HOUSE and search for him, to make an arrest, though the defendant is not there, if such officer acts *bona fide* under a belief that the party is there, and after due notice, and does no unnecessary damage.

TRESPASS *quare clausum fregit* for breaking and entering the plaintiff's house. The defendant justified on the ground that the alleged trespass was committed by him as deputy sheriff in endeavoring to arrest the plaintiff under a criminal process. It appeared that on two occasions, once in the day-time and once in the night, the defendant went with a criminal warrant to arrest the plaintiff, demanded admittance, stating his purpose, waited a reasonable time, and then broke and entered the house and searched it, using no unnecessary violence. There was evidence tending to show that the plaintiff was not in the house either time, and the court ruled that if this was so, the defendant was liable, though he acted under a *bona fide* belief that the plaintiff was there. Verdict for the plaintiff, and exceptions by the defendant.

B. F. Butler, for the plaintiff.

N. J. Lord, for the defendant.

By Court, DEWEY, J. The maxim of law that every man's house is his castle is applicable to arrests in civil suits, and has not the effect to restrain an officer of the law from breaking and entering a dwelling-house for the purpose of serving a criminal process upon the occupant. In such case the house of the party is no sanctuary for him, and the same may be forcibly entered by such officer after a proper notification of the purpose of the entry, and a demand upon the inmates to open the house, and a refusal by them to do so: *Fost.* 320; 1 East P. C. 326; 1 Hale P. C. 459; *State v. Smith*, 1 N. H. 346.

It being the duty of the officer to arrest the plaintiff, although in his own dwelling-house, and to effect this, if need be, by breaking and entering the house by force, it was his further duty to make search for him there, and although in the event it appeared that he was not in the house at the time such arrest was attempted to be made, yet the breaking and entering the house for the purpose of arresting him would be justified, if the officer acted *bona fide*, and under the belief that the party was there, and after proper notice broke and entered the house, doing no unnecessary violence or damage.

The ruling of the court of common please was erroneous on this point, and the verdict must be set aside, and a new trial granted.

RIGHT OF OFFICER TO BREAK DOORS TO EXECUTE PROCESS: See the note to *Keith v. Johnson*, 25 Am. Dec. 167, in which this subject is discussed. See also *Howe v. Butterfield*, 50 Id. 783, and prior cases in this series collected in the note thereto.

LINFIELD v. OLD COLONY R. R. CORP.

[10 CUSHING, 582.]

LESSEE OF RAILROAD IS LIABLE FOR INJURY BY NEGLECT TO KEEP AND RING BELL upon a locomotive, as required by the Massachusetts statute, whereby a collision with a vehicle crossing the track is caused.

RAILROAD COMPANY NEGLECTING REASONABLE PRECAUTIONS BESIDES RINGING BELL, as required by statute, to avoid collision with a vehicle at a turnpike crossing, is liable for an injury arising from such neglect, and it is for the jury to judge as to whether or not such additional precautions have been neglected.

ADVERSE PARTY HAS RIGHT TO BENEFIT OF ANY ANSWER OR WITNESS testifying against him, either orally or by deposition, if he thinks such answer favorable to him, and the party examining the witness can not suppress such answer.

PARTY INTENDING NOT TO USE ANSWERS IN DEPOSITION TAKEN BY HIM, except in reply to testimony which he expects to be introduced, but which is not introduced, on the other side, must give distinct notice of such intention at the time, or he can not prevent the reading of such answers by his adversary at the trial.

TRESPASS for an injury to the plaintiff's wagon by a collision with a train of the defendants running on the South Shore railroad, leased by the defendants. The first count of the declaration alleged the collision to have been caused by the defendants' neglect to cause a proper bell to be placed on their locomotive, and to be rung at crossings, as provided by the sections of the

statute referred to in the opinion. The second count alleged, in substance, that the injury was caused by the defendants' improper, negligent, and insufficient construction and equipment, and negligent, unskillful, improper, and unlawful running, management, etc., of their train of cars and engine. The lease from the South Shore Railroad Company to the defendants was introduced in evidence. There was evidence tending to show also that the bell on the defendants' train, which caused the injury, was not rung as required by law, and that the bell on the engine was not suitable for the purpose; that the train was backing at the time of the injury; that there was no gate at the crossing, and no one stationed there to warn persons of the approach of trains, etc. Certain interrogatories and answers in the deposition of one Tilden, a witness for the plaintiff, were excluded as incompetent on the defendants' objection. The defendants subsequently introduced the deposition of one Burlingame, but declined to read the answers to two interrogatories, on the ground that the interrogatories were framed solely to meet that part of Tilden's testimony which had been excluded, in case the court should deem said testimony competent; but the court, on the request of the plaintiff, ruled that the defendants must read the whole of Burlingame's deposition, which was accordingly done. The defendants claimed that, inasmuch as the South Shore Railroad Company owned the said railroad, they, and not the defendants, must be held liable for a non-compliance with the statutory requirements as to providing and ringing a bell, but the court held otherwise. The court further instructed the jury, among other things, that while it was not unlawful for the defendants to back their train over the road, if it was attended with more danger of collision, they must use greater care and precaution while backing said train; that the jury must judge, under all the circumstances, what were reasonable and proper precautions, and what omission of precautions would constitute negligence; that ringing the bell as required by law was not sufficient to excuse the defendants if the circumstances rendered it reasonable to take other precautions to prevent injury; that the formation of the ground, etc., might be such as to prevent a bell's being heard; and that the jury must determine whether, under the circumstances, reasonable care required that the defendants should take other precautions, besides ringing the bell, to prevent collisions. Verdict for the plaintiff, which was to be set aside if the rulings of the presiding judge were erroneous.

R. Choate and J. L. English, for the plaintiff.

S. Bartlett and D. Thaxter, for the defendants.

By Court, METCALF, J. The first count in the plaintiff's declaration is founded on the revised statutes, c. 39, secs. 78, 81. Section 78 requires every railroad corporation to cause a bell, of at least thirty-five pounds in weight, to be placed on each locomotive engine passing upon their road, and to be rung at the distance of at least eighty rods from the place where said railroad crosses any turnpike, etc., upon the same level with the railroad, and to be kept ringing until the engine has crossed such turnpike, etc. Section 81 provides that if any such corporation shall unreasonably neglect or refuse to comply with said requisition, it shall be liable for all damages sustained by any person by reason of such neglect.

The first question discussed at the argument of this case was, whether the defendants are liable, under these sections, or whether the action can be maintained only against the South Shore Railroad Company; and our opinion is that the defendants are liable. The indenture executed by the two corporations on the twentieth of September, 1847, and their agreement made on the thirty-first of March, 1849, constituted a lease of the South Shore railroad to the defendants, which took effect, as such, on the first of April, 1849: Bac. Abr., Leases, K; 1 Platt on Leases, 579 et seq. We need not inquire whether a railroad corporation can make a valid lease of its road, either to a like corporation or to individuals, without legislative authority expressly conferred; for the legislature, by a statute passed before the happening of the accident now in question, Stat. 1849, c. 163, expressly authorized the defendants "to carry out their contract" of September 20, 1847, for a lease of the South Shore railroad. The lease, then, being valid, we can not doubt the liability of the defendants for any neglect or refusal by them to comply with the requisitions of the revised statutes, c. 39, sec. 78. On the first of April, 1849, and thenceforth, the railroad which was leased to them was "their road," within the just meaning of that section. Nor can we doubt their liability for an injury caused by any other culpable neglect of theirs in the management of their engines on the same road. For railroad corporations are bound to use all reasonable care, besides that of ringing a bell, etc., as directed by statute, to avoid collision when their engines are crossing a turnpike or other way: *Bradley v. Boston & Maine Railroad*, 2 Cush. 539. And so the

jury were instructed in the present case. Exception is taken, however, to the instructions given on this point. It is said that they were such as authorized the jury to find that it was the duty of the defendants to have had a gate at the crossing, if that was a reasonable precaution for the place and circumstances, and to return a verdict against them, because they had not a gate; whereas, by the revised statutes, c. 39, sec. 80, and Stat. 1846, c. 271, sec. 2, railroad corporations are not bound to erect gates at crossings, unless specially required so to do by county commissioners. But we see no error or defect in the instructions. The judge left it to the jury to decide whether precautionary measures, in addition to the ringing of a bell, ought to have been adopted by the defendants to prevent a collision, and whether, under the circumstances of the case, they used reasonable care to prevent it. The verdict, therefore, shows that the defendants had not adopted reasonable precautionary measures; and we can not inquire what might have been the views of the jury as to the specific measures which the defendants ought to have adopted. It is certain that nothing in the instructions warranted the jury to find the defendants guilty because they omitted to do that which the law did not require them to do.

Exception is also taken to the ruling of the judge, that the plaintiff had a right to require that the answers of Burlingame, the defendants' witness, to the twentieth and twenty-first interrogatories put to him, should be read to the jury. Perhaps it is immaterial in this case whether that ruling was right or wrong, because the answers of the witness were such as could neither do the plaintiff any good nor the defendants any harm. But as the point has been argued, and may hereafter be of some practical importance, we have considered it, and have come to the conclusion that a party has a right to such of the testimony contained in a deposition taken by his adversary as he may deem favorable to himself, if it be testimony which it is competent for his adversary to introduce. When testimony is given *viva voce*, all that a witness says on his examination in chief, if it be competent testimony, must be taken as he states it, although it operates against the party who calls him; and if on cross-examination his answers to questions, which the party calling him could not put, favor that party, those answers can not be suppressed; each party being entitled to the benefit of all the legal testimony that favors his cause, from whatever witnesses it proceeds. The same rule is applicable, generally, to testi-

mony given in depositions; *Breyfogle v. Beckley*, 16 Serg. & R. 264; *Calhoun v. Hays*, 8 Watts & S. 127 [42 Am. Dec. 275].

Is a case like the present within this rule, or an exception to it? The defendants insist that as the interrogatories in question were filed for the sole purpose of meeting, by the answers thereto, the testimony of Tilden, in his deposition taken by the plaintiff, and as his testimony was excluded by the judge, they ought not to have been required to submit Burlingame's answers to the jury. The plaintiff, on the other hand, insists that he had a right to have those answers read to the jury, because the defendants did not file with the interrogatories a notice that they were filed *de bene esse*, and that the answers were not to be used except to meet Tilden's testimony. He admits that if such notice had accompanied the interrogatories he could not have rightfully called for the reading of the answers. And we are of opinion that when one party takes a deposition on interrogatories for the purpose of meeting the testimony of a witness who has deposed, or testimony which he may expect the other party will produce, but does not intend to use the answers thereto unless the other testimony is introduced, he must accompany the interrogatories with a distinct notice in writing that his purpose is merely to meet the testimony of his adversary's witness or witnesses; and that if this is not done, the answers must be read to the jury, if required by the other party. We deem this the most eligible rule in such cases. It will save to each party all his just rights, and prevent all unfairness and surprise.

It was suggested in argument that the judge should have decided upon inspection, or upon the affidavit of the counsel who filed the interrogatories, that they were filed for the purpose of meeting Tilden's testimony; and that in all cases the judge at the trial should decide whether or not, upon the face of interrogatories and upon examining the other evidence in the case, it appears that they were filed merely for the purpose of meeting a contingency. But we do not adopt these suggestions. In our judgment, the course which we have indicated is much preferable as a matter of practice. It is recommended by its simplicity, convenience, and certainty; and it will prevent the necessity of a judge's trying questions of fact, or exercising a discretionary power for want of a fixed rule to guide him.

Judgment on the verdict.

LESSOR OF RAILROAD TAKES IT SUBJECT TO DUTIES imposed by law for the protection of the public, such as the duty of fencing the track, and must

answer for any injury resulting from neglect of that duty: *McCall v. Chamberlain*, 13 Win. 641, citing the principal case.

RAILROAD COMPANY NEGLECTING REASONABLE PRECAUTIONS TO PREVENT COLLISIONS at highway crossings is not exempted from liability for injuries resulting therefrom merely by showing that it complied with the statutory requirements as to ringing the bell, etc.: *Commonwealth v. Boston etc. R. R. Corp.*, 101 Mass. 202; *Norton v. Eastern R. R. Co.*, 113 Id. 369; *Favor v. Boston etc. R. R. Corp.*, 114 Id. 352; *Eaton v. Fitchburg R. R. Co.*, 129 Id. 365. Whether or not all reasonable precautions have been adopted is a question for the jury: *Norton v. Eastern R. R. Co.*, and *Favor v. Boston etc. R. R. Co.*, *supra*. Neglect to erect a sign-board at a crossing will render the company liable for an injury resulting therefrom, if the jury find that a sign-board should have been erected and that neglect to erect one produced the injury: *Elkins v. Boston etc. R. R. Corp.*, 115 Mass. 201, all citing the principal case.

WHETHER NEGLIGENCE IS QUESTION OF FACT OR LAW: See *Herring v. Wilmington etc. R. R. Co.*, 51 Am. Dec. 395, and note. That the question of negligence is generally one of fact, and not of law, is a point to which the principal case is cited in *Detroit etc. R. R. Co. v. Van Steinbury*, 17 Mich. 118.

RIGHT OF PARTY TO HAVE PARTS OF ADVERSARY'S DEPOSITIONS READ: See *Calkoun v. Hays*, 42 Am. Dec. 275. See generally, as to admitting or excluding part of a deposition, *Olds v. Powell*, Id. 605; *Miles v. Stevens*, 45 Id. 621. The party proponounding a cross-interrogatory in a deposition can not object to the reading of the answer thereto on the ground that it relates to part of the direct examination which has been excluded at the trial unless he gave notice that the cross-interrogatory was put *de bene esse*: *Sherman v. Rauson*, 102 Mass. 400, citing the principal case.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

DWIGHT v. BLACKMAR.

[2 MICHIGAN, 330.]

ADMINISTRATOR CAN NOT BECOME PURCHASER of the estate or effects of his intestate.

QUESTION OF INTEREST OR FAIRNESS CAN NOT BE CONSIDERED in sale of intestate's estate to administrator, inasmuch as such sales are void.

RULE THAT AGENT IS PRECLUDED FROM PURCHASING PROPERTY OF HIS PRINCIPAL is founded upon the principle that the law will not permit a man to act in the double capacity of principal and agent.

ERROR from Jackson circuit. The facts are stated in the opinion.

A. Blair, for the plaintiff.

S. H. Kimball, for the defendant.

By Court, WHIPPLE, J. This cause is brought before us by writ of error from the circuit court of the county of Jackson. The action was ejectment for an undivided eighth part of a lot or parcel of ground lying in the village of Jackson. On the trial, the plaintiff established the title of Samuel Blackmar, his ancestor, to the land in question, and having proved the death of said Samuel, and that he was one of his heirs at law, and that Dwight & Pierce were in possession of the premises at the commencement of the suit, the former claiming to be owner thereof, rested his cause.

The defendants, to maintain the issue on their part, gave in evidence the record of a deed from Lucy Acker, John F. Durand and Silence, his wife, Louis Miller and Mary, his wife, Elizur B. Chapman and Julia, his wife, to Russell Blackmar, dated

June 1, 1836, of certain premises, including the lot in controversy; the said Lucy, Silence, Mary, and Julia being the four daughters and heirs at law of the said Samuel Blackmar.

After certain preliminary proofs, the defendants next offered in evidence a deed of the premises, from Russell Blackmar, administrator, and Eunice Blackmar, administratrix, of Samuel Blackmar, to Russell Blackmar, dated the second of August, 1836. To the introduction of the deed as evidence in the cause, the plaintiff, for various reasons, objected; the objections, however, were overruled, and the deed was read to the jury as evidence. It from these appeared that Dwight claimed to be owner of the premises by virtue of a conveyance to him by Russell Blackmar, and that Pierce was his tenant.

From this statement it will be seen that the plaintiff claimed as one of the heirs at law of Samuel Blackmar, and that Dwight's claim was founded upon a conveyance to him by Russell Blackmar, who professed to have acquired title by virtue of a deed from himself as administrator and Eunice Blackmar as administratrix of the said Samuel Blackmar. It was claimed that Russell Blackmar and Eunice Blackmar sold the land by virtue of a license of the judge of probate of Jackson county, upon the representation of the administrator and administratrix of Samuel Blackmar that the personal property left by the deceased was insufficient to pay his debts.

It is not my purpose to consider the numerous questions raised on the trial and appearing in the voluminous record before us, respecting the admissibility as evidence of the deed from the personal representations of Samuel Blackmar to Russell Blackmar, through whom Dwight claims title, as many of these questions were decided upon the erroneous view taken by the circuit court, of the legal character of the deed. It will also become unnecessary, for the same reason, to express an opinion upon other points made in the progress of the trial, and in respect to which exception was taken to the ruling of the court by the plaintiff. Those rulings were the consequence of a misapprehension by the court below, of the validity and effect of the sale made by the administrators of Samuel Blackmar.

To the introduction of the deed executed by Russell Blackmar, administrator, and Eunice Blackmar, administratrix, of Samuel Blackmar, to Russell Blackmar, objection was made, on the ground that the deed was fraudulent and void. The court below, however, held that the deed was not absolutely void, but merely voidable. If the judgment of the circuit court upon

this point can not, upon correct legal principles, be sustained, the title of Dwight fails, and the plaintiff, upon the showing in the court below, was entitled to a verdict.

While it is the duty of this court to view with liberality the proceedings of the probate court, when those proceedings are called in question to support titles derived through them, we are not at liberty to overthrow principles which have their foundation in the soundest rules of policy and morality, and the inflexible enforcement of which is deemed necessary to secure a faithful and honest administration of their duties by those to whom is committed the execution of delicate and important trusts.

It is probable that the attention of the circuit court was not called to several decisions, made at an early period in the history of this state, by the court of chancery, involving the precise question upon which the rights of the parties in this case depended. Those decisions, it is true, were not authoritative and binding upon the circuit court, not having received the sanction of this court. They were nevertheless entitled to great consideration, from the fact that they embodied the views of two high judicial officers, and seem to have been acquiesced in by counsel, as no attempt was made to call in question their accuracy or soundness by an appeal to this tribunal. Whatever doubt or obscurity may have hung over the important question submitted for our decision in this case, in consequence of views expressed by English and American judges a half-century ago, and still maintained in some of the states, those doubts have been dissipated, and the doctrine maintained by this court in the case of *Clute v. Barron*, 2 Mich. 192, rests upon a foundation too solid to be shaken. That doctrine was commended to our adoption by reasons of policy so overwhelming, and supported by an array of authority so irresistible, as to make the path of duty plain, and leaves the doctrine, where it should have been left, unimpaired by the unreasoned opinions or bare suggestions to be found in a few reported cases.

In the case of *Beaubien v. Poupard*, Harr. (Mich.) 206, Chancellor Farnsworth set aside a sale made by Poupard, as administrator, on the ground that "the rule is imperative that he could not become a purchaser." In *Walton v. Torrey*, Id. 259, the same chancellor held that a purchase made by Torrey, of real estate sold under his order as judge of probate, was void, and referred to the masterly opinion of Chancellor Kent, in *Davoue v. Fanning*, 2 Johns. Ch. 268, in supporting to the full-

est extent his opinion. In *Ingerson v. Starkweather*, Walk. 346, Chancellor Manning held that a purchaser of school lands, at a public auction, in the name of one Norton, by the defendant, who was a clerk of the superintendent of public instruction, was void, it appearing that the clerk was interested in the purchase. The reason of the rule is thus stated by the chancellor: "It is contrary to every sound principle of equity to allow an agent, who is authorized to sell property for the best price that can be obtained for it, to become the purchaser himself. It is immaterial whether the sale be public or private; whether the agent purchased in his own name or that of another. The object is to secure fidelity on the part of the agent to his principal, and it is as applicable to public agents as others." In the case of *Church v. Marine Insurance Company*, 1 Mason, 341, Mr. Justice Story states the rule to be that "the law will not suffer any man to earn a profit, or expose him to the temptations of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser, either at a public or private sale. The case then stands before the court as if there was no sale; the ownership has never been legally divested." The same doctrine is asserted and vindicated with great ability by Chancellor Kent in the case of *Davoue v. Fanning, supra*. In the case of *Torrey v. Bank of Orleans*, 9 Paige, 649, the learned chancellor states the rule in clear and comprehensive language: "It is a settled principle of equity that no person placed in a situation of trust or confidence, in reference to the subject of the sale, can be a purchaser of the property on his own account." The same doctrine is illustrated and enforced in a recent case in the English chancery by Lord Cottenham. He says that "the principle was not confined to a particular class of persons, such as guardians, trustees, or solicitors, but was a rule of universal application to all persons coming within its principle, which is that no party can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of a purchaser." In *Ex parte Bennett*, 10 Ves. 384, the same doctrine is maintained with great force of reasoning by Lord Eldon, who held that "neither the solicitor to a commission of bankruptcy, nor a commissioner in bankruptcy, can purchase either for themselves or another."

In a recent case decided by the supreme court of the United States, *Michoud v. Girod*, 4 How. 503, the doctrine was most elaborately and ably discussed, after an extended examination of the cases on that subject; and it was held that a person can

not legally purchase on his own account that which his duty or trust requires him to sell on account of another, and that such a purchase carries fraud on its face. But it would seem superfluous to multiply authorities upon a question which was, in effect, settled by this court at its last January term, in the case of *Clute v. Barron*, 2 Mich. 192. It was then determined that a purchase made by a county treasurer of lands sold for taxes was void. In the opinion delivered on that occasion, the leading cases to be found in England and this country were cited and reviewed. The principles established in that case embrace the one now before us, and render the deed of conveyance, through which Dwight claims title, nugatory and void. The fairness or unfairness of the transaction is not open to proof or discussion. The law denounces it as fraudulent. A relaxation of this doctrine was formerly imputed to Lord Hardwicke, in a case decided in 1743, in which he is reported to have held that where there was a decree of a trust estate, and an open auction by the master, or a public sale by proclamation in the country, then the court had permitted a trustee to purchase, and refused to set aside a sale where all other circumstances were fair. This qualification of the rule finds no support in the modern cases, and seems to have been repudiated, subsequently, by the great chancellor himself in *Whelpdale v. Cookson*, 1 Ves. sen. 9; 5 Id. 682, in which he remarked "that it was not enough for the trustee to say you can not prove any fraud, for it is in his power to conceal it." That it finds no favor in the English chancery may be gathered from a remark made by Lord Eldon, in *Ex parte Bennett, supra*, in repelling the doctrine held by Lord Rosslyn, "that to effect the sale, the trustee must make an advantage." Lord Eldon says "the principle is deeper, viz.: that if a trustee can buy in an honest case, he may in a case having that appearance, but which from the infirmity of human testimony may be grossly otherwise."

I know of no case in which the principle I have endeavored to establish should be more rigorously applied to its full extent than to that of sales made by executors or administrators. They are trustees charged with the execution of duties exacting the most perfect good faith, and where the obligations of duty are likely to be overcome by the appeals of avarice. To secure fidelity to the trust, self-interest must not be allowed to come in conflict with integrity. Courts, by their decisions, should not allow persons to place themselves in a situation where the temptations to violate duty and conscience are so great. The

evil can only be reached by the vigilance and firmness of our courts in applying to every case falling within the principle the rule established by the cases I have cited. Let it be once understood, that in every case of a purchase by a trustee or agent, the question of intent or fairness is to enter into the discussion, and the result would prove disastrous to the interests of society. In many instances the powers of a court of equity (in the language of Lord Eldon) would not be equal to protect it against deception, from the impossibility of knowing the truth in every case. Frauds would lurk in transactions which the eagle eye of the law could not detect.

The record reveals a case which calls for a stern application of the rule, and illustrates its fitness and necessity. The administrator's account showed the debts to amount to the sum of two thousand one hundred and seventy-eight dollars and forty-three cents. Of this amount nine hundred and eight dollars and fifty-seven cents was paid by the personal assets, leaving a balance unprovided for of one thousand two hundred and sixty-nine dollars and eighty-six cents. Among the items making up the gross amount of indebtedment were the following: "Claim of Horace Blackmar on the estate, five hundred dollars; claim of Russell Blackmar, one thousand dollars."

These two items stricken from the account would have left a balance of two hundred and thirty dollars and fourteen cents; rendering a sale of the real estate unnecessary. That these two charges bear very strongly the impress of unfairness, is too clear for argument, especially when it is remembered that the item of one thousand dollars, in round numbers, was claimed by the administrator, and the other of five hundred dollars was claimed by his brother. No explanation of these charges is disclosed by the records of the probate court. The minor children of the deceased, when arrived at the age of discretion, would seek in vain for an explanation in respect to claims stated in such general terms. Obscurity would rest on the transaction, too deep to be penetrated by the light which living witnesses might cast upon it; and thus they would have to submit to a wrong, for which neither a court of law nor equity can provide an adequate remedy. The patrimony left by their father, to educate and nourish them, has been scattered by the hand of fraud, without the ability on their part, or on the part of the courts, to repair the injury. But again, the record shows that real estate, to the amount of two thousand six hundred and twenty-five dollars, was sold to pay the balance of indebtedment, which

(including the two items of one thousand dollars and five hundred dollars) was but one thousand seven hundred and thirty dollars and fourteen cents. This circumstance wears an unfavorable aspect, and stamps the transaction with illegality. How such a proceeding could have received the sanction of a judicial tribunal it is difficult to imagine.

But it is a useless consumption of time to analyze these proceedings of the probate court. They are so full of infirmities as to inspire the belief that the rights of property founded on its decrees are held by a frail tenure.

The judgment in this case must be reversed, with costs, and the cause remanded for a new trial.

RIGHT OF ADMINISTRATOR OR EXECUTOR TO PURCHASE AT SALE OF DECEDENT'S ESTATE.—Administrator can not purchase at his own sale; nor sell under a secret trust; nor dispose of the trust property for his own benefit, or for the benefit of private friends: *Pearson v. Moreland*, 45 Am. Dec. 319; *Scott v. Freeland*, Id. 310; *Planters' Bank v. Neely*, 40 Id. 51; *Rogers v. Rogers*, 20 Id. 716. But there is another class of cases which hold that purchases made by such trustees as executors or administrators at their own sales and on their own account are voidable only, and not void: See *Worthy v. Johnson*, 52 Id. 399; *Musselman v. Eshleman*, 51 Id. 493, and cases cited in the notes. In *Erskine v. De la Baum*, 49 Id. 751, the court held that a purchase by an administrator of the heir's interest in the land belonging to the intestate is not void *per se*, and the heir, and those claiming under him, can only attack such sale by showing fraud on the part of the administrator in procuring such purchase.

MIDDLESWORTH v. NIXON.

[2 MICHIGAN, 625.]

EXECUTORS IN BRINGING ACTION TO FORECLOSE MORTGAGE due the estate of their testator should not only allege in their declaration that they were the executors, but should also allege the death of their testator, the probate of the will, their interest or right in the action, and an averment of such facts as are necessary to sustain the action.

EXECUTORS ARE PRECLUDED FROM PROVING THEIR OFFICE by general reputation in actions brought to recover debts due their testators' estates.

APPEAL from the circuit court of Genesee county. The facts are stated in the opinion.

M. Wisner, for the plaintiffs.

T. J. Drake, for the defendants.

By Court, WING, P. J. The case is substantially as follows: The defendants, or some of them, executed notes and a mort-

gage to John Middlesworth. After the notes fell due this bill was filed by complainants to foreclose the mortgage. In the commencement of the bill the complainants describe themselves as follows: "Your orators, Isaac R. Middlesworth and James Middlesworth of Argentine, Genesee county, Michigan, executors of the last will of John Middlesworth, late of Argentine, in said county of Genesee," etc. This is all the statement to be found, which sets up the right or interest of the complainants in the note or mortgage, or their right to file a bill for the foreclosure of the mortgage. It is not stated in the stating part of the bill that the mortgagee is dead; that complainants have been appointed executors of his last will and testament, or that they have any interest in the mortgage. There is no legal proof in relation to the rights of complainants, and the point made before this court is, that the complainants are not entitled to the decree of foreclosure, which was granted by the circuit judge, as they have not in their bill stated their interest in the notes and mortgage.

The answer of defendants does not question the right of complainants to file the bill, but seeks to defeat their right to a foreclosure, upon the ground that certain agreements had been made between the original parties to the note which should prevent a decree being made against them. The execution of the notes and mortgage was admitted, and proof was taken in support of the defense; but the circuit judge held that the defense was not sustained, and as the defendants had not demurred to the bill, or in any manner objected to the statement of the claim of complainants, or their right to sue, he would consider the descriptive statement of complainants in the commencement of the bill as a statement of the fact that John Middlesworth was dead, and that complainants were his legal executors, and that they urged their claim in that capacity, especially after the complainants had been subjected to so great expense in prosecuting their suit.

This court, however, has not felt authorized to sustain this decree of the circuit court, as the stating part of the bill does not present a case upon which to base such a decree; for if all that the complainants have alleged is fully admitted, it shows no right of action. All that the bill contains in relation to the representative character of the complainants is found in the descriptive portions of it. No proof could be made of facts, or of a cause of action not set forth in the stating part of the bill. No allusion is made to the probate of the will of John Middles-

worth—the payee of the notes—and no substantive averment of facts is made that would authorize proof on this point.

Again, if it be admitted that the statement of complainants' interest in the notes, or their right to sue, is sufficiently set forth, we think it is not sufficiently proved. The complainants offered to prove by general reputation that they were executors of the last will of John Middlesworth. To this proof the defendants objected; but the court admitted the proof. It is true, the reason for the objection is not a very sound one; but the objection is nevertheless valid, and the evidence should have been excluded.

It is the judgment of this court that the decree of the circuit court be reversed, with costs, and that the case be remitted to the circuit court for further proceedings.

DECLARATION OR COMPLAINT, WHAT IT SHOULD CONTAIN.—Where some dignitary, officer, or person in a special character only can bring the action, the plaintiff must aver that he holds such position, and his interest in the same: *Brewster v. Vail*, 38 Am. Dec. 547. Plea which is bad in part is bad *in toto*: *Ferrall v. Bradford*, 50 Id. 293; *Mead v. Hughes*, Id. 123. Where pleadings of both parties are bad, judgment must be rendered against the plaintiff, as the party who committed the first error in pleading: *Dunlap v. Glidden*, 52 Id. 625, and the notes citing other cases in this series.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

Doe ex dem. Wynne v. Wynne.

[23 Mississ., 251.]

LANDS ACQUIRED BY TESTATOR SUBSEQUENT TO DATE OF WILL will pass by devise where such appears to be the intention of the testator.

WHERE TESTATOR USES GENERAL WORDS CONVEYING his whole estate, all that he has at his decease will pass thereby.

WHERE PROPERTY DEVISED BY WILL IS SITUATED IN ONE STATE and the will was executed in another, the law of the former will prevail in determining the right of parties to take under the will.

INTENTION OF TESTATOR MUST GOVERN IN CONSTRUCTION OF WILLS wherever the same is practicable.

APPEAL from the circuit court of De Soto county. The facts are stated in the opinion.

Buckner and Anderson, Mayes and Anderson, and Scruggs and Walter, for the plaintiffs.

J. F. Trotter, and Walton and Craft, for the defendant.

By Court, YERGER, J. Albert H. Wynne departed this life in the state of Tennessee on the — day of June, in the year 1849. In the year 1829, when he was in good health, he executed his last will and testament, all in his own handwriting, by which, after providing for the payment of his debts, he declares: "Item 2. I give to my much-beloved wife, Michal Wynne, all the balance of my property, both real and personal; to have and to hold, to her own benefit, to the exclusion of all others." At the date of this will the testator owned a small tract of land in Tennessee, worth not more than three hundred

or four hundred dollars, and about twenty thousand dollars' worth of personal property. He subsequently disposed of that tract of land, and in the year 1840 or 1841 bought the land in controversy, situated in De Soto county, in the state of Mississippi. The plaintiffs, who are his heirs at law, claim the land as such heirs at law. The defendant, his widow, claims it by virtue of the above-recited will, which was admitted to probate, both in Tennessee and Mississippi. The deceased during his last illness several times stated to his friends, when three or more were present, that "his will had long been made, and disposed of his whole property, contained but a single clause, and that at his death it gave his whole estate to his wife." The testator had no children at the date of the will, and continued childless till his decease. It is also admitted at the date of his will that the common law on the subject of wills prevailed in Tennessee, and that the same was afterwards altered by statute, so as to permit a party to devise lands of which he was not seised at the date of the will.

These facts in the case are all agreed, so that the question presented for our consideration is entirely legal in its character. That question is this: Can the defendant, the devisee in the will, hold the lands acquired by the testator subsequent to the date of the will to the exclusion of the heirs at law?

As the land is situated in this state, the rights of the parties to it must be determined by the laws of Mississippi, although the testator was domiciled in Tennessee at the date of the will, and at the time of his decease: Story Confl. L., sec. 174; see Jarm. on Wills, 1, and notes.

As this is a case of the first impression in our courts, it is a matter of more interest, and requires a greater degree of consideration than ordinary, in order that the rule to be established may accord with the policy of our laws, and harmonize with the intention of the legislature.

At the common law, as is well known, a devise of lands could not be made. The reason for this rule, it is said, grew out of the system of feuds prevalent in England, and which prohibited the alienation of lands by deed without the consent of the feudal lord, or *by devise*, lest the lands might pass into the hands of some one unable to render the feudal services required by the original investiture: 2 Bla. Com. §74.

The law of England thus stood until the statute of 32 Hen. VIII., c. 1, explained by 34 Id., c. 5, which enacted, "that all persons (except *femes covert*, etc.), being seised in fee simple,

might, by will and testament in writing, devise to any other person," etc.: 2 Bla. Com. 375.

The construction which was early put upon this statute by the judges was, that to authorize a devise of lands by will, it was requisite that the testator should be seised in fee at the date of the will; and hence, it was always held that a will, which on its face showed a clear intention to convey after-acquired lands, even where the words of the will were express to that effect, was inoperative and void as to such lands, for want of power in the testator to make the devise: Gilb. on Devises, 136-138; *Langford v. Pitt*, 2 P. Wms. 629; *Girard v. Mayor etc. of Philadelphia*, 4 Rawle, 323 [26 Am. Dec. 145].

Upon examining the cases, it will be found, then, that however clear and manifest the intention of the testator may have been to convey after-acquired lands, it has been uniformly held that such interest could not prevail or be carried into effect, because there was no capacity or power in him to make the devise.

To remedy this inconvenience, our statute of wills, passed in 1831, provided that "every person (except, etc.) shall have power, at his or her will and pleasure, by last will and testament, or codicil in writing, to devise all the estate, right, title, and interest in possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, of, in, or to lands, tenements, etc., or goods and chattels and personal estate of every description whatsoever," etc.: Hutch. Code, 649.

It will be seen, then, from this statute, that the power to devise can not be questioned in this state. The power certainly exists to convey by will lands acquired after the date of the will. The only question which can arise here is as to the interest of the testator; and whatever that interest may be, it must prevail as well in relation to wills of realty as of personalty.

"A will," said Lord Mansfield, in *Goodright v. Glazier*, 4 Burr. 2515, "is ambulatory till the death of the testator. If the testator let its stand till he dies, it is his will; if he does not suffer it to stand, it is not his will." Every testator knows this to be the law, and also that his will does not take effect till his death. It is the property of which he may die seised that he is seeking to dispose of, and accordingly it has been always held in relation to personal estate, that if he use general words conveying his whole estate, all that he has at his decease will pass thereby, regardless of the date; and this, upon the presumed intention that as he knew the will was not to take effect till after his death, and he was preparing for that event, and pro-

viding for the disposition of his property afterwards, he intended that all the property he might then have should pass by this will, or he would have directed otherwise.

The rule of law upon this subject is stated by an eminent writer in the following words: "Under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of property to the full extent of his capacity; and accordingly, such a gift in regard to real estate was read as a gift of the property belonging to the testator at the time of the execution of his will (he being incapable of devising any other); and as to the personality, as a disposition of what he might happen to possess at the period of his decease:" 1 Jarm. on Wills, 287.

It will thus be seen that the reason, under the old law, why a general gift of the testator's real estate did not pass all he had at his decease was not that he did not so intend, but because, under the law, his intention could not be carried out for want of power or capacity in the testator to make the devise.

As the statute of our state before referred to has conferred the power, the only valid reason which ever existed for a difference in the construction of general gifts by will of real and personal estate has ceased, and we are of opinion that, in this respect, wills of real and personal estate should be placed upon the same footing.

By reference to the language of the will in this case, we can not see a reason to question the intention of the testator. After directing the payment of his debts, the will bequeaths to his wife "all the balance of his property, both real and personal, to have and to hold, to her own benefit, to the exclusion of all others."

We do not think language clearer or more explicit could have been used to show an intention to devise all the real estate of which the testator might die seised, regardless of the date of its acquisition by him.

If any authorities were needed to sustain the construction of the law and of the will in accordance with the views here expressed, the decisions of the courts in Massachusetts and Missouri would be sufficient for that purpose: *Wait v. Belding*, 24 Pick. 136; *Cushing v. Aylwin*, 12 Met. 175; *Brimmer v. Sohier*, 1 Cush. 132; *Willis v. Watson*, 4 Scam. 65.

The decisions referred to in *Allen v. Harrison*, 3 Call, 305, and *Smith v. Edrington*, 8 Cranch, 70, arising upon the statute of Virginia, do not necessarily conflict in principle with the view

of the law taken by us. In both these cases, the courts admit that the only question upon the subject is as to the intention of the testator, and whatever that may be, it must prevail. In those cases it was held, that it appeared from the will and the surrounding circumstances, that after-acquired lands were not intended to be conveyed. We are not willing to assent to the opinion expressed in 3 Call, 305, that to show an intention to convey after-acquired land, the will must contain a clause to that effect. Any other words which would show the intention as clearly would be as sufficient for the purpose.

The argument has been pressed upon us, that as by the law of Tennessee at the date of the will, the testator could not devise after-acquired land, we must presume that it was not his will or intention that they should pass by the devise.

But this argument is not entirely tenable. The cases in the books are numerous where the intention of the testator to convey was manifest, but where that intention could not prevail, because it controverted the law, and we presume that the courts of Tennessee in regard to realty situated there, in giving a construction to this will, would decide that on the face of the will the intention is manifest that the testator designed bequeathing to his wife all the real estate of which he might die seised, regardless of the date of its acquisition. It is true that in Tennessee, at the date of this will, that intention, however clear, could not have been carried into effect, because the testator had no power at that time by the law of that state to make such a devise. Whether or not the courts of that state would hold that the subsequent statute, conferring the power upon the testator to make such a will, would justify them in sustaining this will as to realty situated there, and acquired after its date, we do not know. But it is clear to our minds, that, as the will manifestly shows that the intention of the testator was to give to his wife all the property of which he might die seised, whether owned at the date of it or subsequently acquired, that intention must prevail and be carried into effect by the courts of this state in regard to realty situated there, there being no question whatever that the power existed under our laws to make such a will. We are therefore of opinion, that the defendant in error is entitled by the laws of this state to the lands in controversy.

This view of the case makes it unnecessary to examine the question of republication.

Let the judgment be affirmed.

WHEN AFTER-ACQUIRED LANDS PASS BY WILL.—It is the settled law of England that after-acquired lands are unaffected by a will: *Anakin v. Bakerham*, Holt, 750. The same doctrine has been held and frequently acted on in several of the states of the Union: See *McKinnon v. Thompeon*, 3 Johns. Ch. 307; *Livingston v. Newkirk*, Id. 312; *Halloway v. Buck*, 4 Litt. 293; *Smith v. Edrington*, 8 Cranch, 67. The courts holding that even where such appeared to be the intention of the testator, a republication of the will was necessary in order to pass subsequently acquired estate: *Beall v. Schley*, 41 Am. Dec. 415; *Bruen v. Bragan*, 38 Id. 519; *Meador v. Soreby*, 36 Id. 432; *Donohoo v. Lee*, 55 Id. 725, and notes. ♦

CONSTRUCTION AND INTERPRETATION OF WILLS—INTENTION OF TESTATOR MUST GOVERN.—Construction and interpretation of a will should not be resorted to where the intention of the testator is clothed in unequivocal language or expressions: *Theall v. Theall*, 26 Am. Dec. 501. Intention of the testator must govern if not inconsistent with the rules of law: *Covenhoven v. Shuler*, 21 Id. 73; *Montgomery v. Milliken*, 43 Id. 507; *Ruston v. Ruston*, 1 Id. 283. Particular and minor intent must not frustrate general and ulterior objects of paramount consideration in the construction of wills: *Chase v. Lockerman*, 35 Id. 277; *Heisse v. Markland*, 21 Id. 445; *Boisseau v. Aldridges*, 27 Id. 590; *Scott v. Nelson*, 29 Id. 286. The construction of a will is purely a matter of common-law jurisdiction: *Small v. Small*, 16 Id. 253; *Yundt's Appeal*, 53 Id. 498.

LEX DOMICILI GOVERNS TESTAMENTS AND SUCCESSION GENERALLY.—The law of the domicile generally prevails in governing wills and successions. A state may regulate the transfer of property, real and personal, within its limits, either by last will or *inter vivos*, because all property must be bound by its laws: *Mahorner v. Hooe*, 48 Am. Dec. 706; *Lindsay v. McCormack*, 12 Id. 387.

NELSON v. SIMS.

[23 MISSISSIPPI, 383.]

PURCHASER OF PUBLIC LANDS OF UNITED STATES who has complied with the necessary preliminaries of purchase is, upon payment of the purchase money, vested with title to the land, unless it is established by proof that the claimant who disputes such title was a *bona fide* purchaser without prior notice of purchase by the party in whom the title is vested.

WHERE PRIOR VENDEE IS IN POSSESSION OF TRACT OF PUBLIC LANDS, and informs a party about to purchase the same that he is the owner, such information will be construed to be proper notice to the intending purchaser of the rights of such possessor.

APPEAL from the northern district vice-chancery court of Columbus. The facts are stated in the opinion.

Boykin and Cruse, Guion and Baine, and Top and Evans, for the plaintiff.

Harris and Harrison, for the defendants.

By Court, SMITH, C. J. This bill was filed by the appellees as the heirs of Edward Sims, to prove a conveyance of four

eighths of land from the appellant, John Nelson, who holds the legal title to it. The complainants base their claim to the land upon an alleged purchase from the United States, made at the land office at Columbus, on the nineteenth day of December, 1833. On the other hand, the defendant claims the land by virtue of a patent, based upon an entry made at the same office, dated the nineteenth of July, 1834, and of course subsequent to the purchase or entry of Sims.

It is manifest from this statement that the case must turn upon the question whether Sims, by means of the alleged entry or purchase, acquired a valid claim to the land. To determine this question, we must refer to the statute then in force regulating the disposal of the public lands. The purchase was made under the act of congress passed on the twenty-fourth of April, 1820: 2 Land Laws, 324. The second section contains the following directions, to wit: "That credit shall not be allowed for the purchase money on the sale of any public lands which shall be sold after the first day of July next; and that a purchaser at private sale shall produce to the register of the land office a receipt from the treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the land office."

A literal construction of this statute, as it seems, would require the production and presentation of the treasurer's or receiver's receipt to the register, by the party desirous of making an entry or purchase, as a necessary preliminary step, without which an entry could not be made. But a different construction was put upon this statute very soon after its passage, by the department of the government having a supervisory control over the sales of the public lands. Not, however, by dispensing with the cash payments required by the act, and which was one of the principal objects which the legislature had in view in its adoption; but by prescribing the formalities necessary to be observed by a person desirous of entering or of purchasing land from the United States. As early as the twenty-ninth of May, 1820, the method in which lands must be purchased of the United States is distinctly prescribed by the treasury department in its circular of that date. That department directs that, "under the new system, an application by an individual to purchase must be in writing; upon that written application the register will certify the quantity contained in the tract applied for, and the price; upon presentation of this to the receiver, he will receive

the amount of the purchase money and issue duplicate receipts, the one to be kept by the purchaser, the other to be left with the register. The written application must be returned to the register to be filed in his office, and when the purchaser receives his patent he must surrender his duplicate:" 2 Land Laws, 302.

We can not doubt that these regulations are predicated upon a proper construction of the statute. The principal object, or at least one of the chief objects, had in view in the passage of the statute of 1820 was the substitution of the cash system in the sales of the public lands, in lieu of the regulations established by the act of 1800. These regulations affect the purposes of congress in that respect, and obviate the embarrassment, to say the least of it, which might result from the construction which should require the applicant to apply in the first place to the receiver, who would, as a necessary result of that construction, have the authority and be required to receive the money, and issue his receipt therefor, without a certificate of the register showing that the land applied for was vacant and subject to entry.

On the twenty-fifth of May, 1831, very full and minute instructions were given to the registers and receivers, in a circular issued from the treasury department. The instructions embraced almost the entire duties of registers and receivers in regard to the sales of public lands. This circular again requires that applications to purchase lands must be made in writing to the register, who gives to the party a certificate, which is the authority to the receiver to receive the purchase money, and who issues his receipt therefor; the duplicate of which he is to hand to the purchaser. The receiver is expressly required to hand over, from day to day, to the register, the receipts issued in favor of purchasers: 2 Land Laws, 444-451.

These instructions have, ever since the statute went into operation, regulated the method of proceeding in the purchase and sale of the public lands. They have been based on a construction given to a statute, providing for the sale of government lands by the officers of the government itself. Their validity has never been questioned, as far as we are informed, by any officer or department of the government. On the contrary, they seem to have been regarded by the attorney general of the United States in many instances as authoritative, and the court, in the case of *Carroll v. Safford*, 3 How. 441, seems tacitly to have regarded them as valid.

Holding, then, that the instructions are predicated upon a

just construction of the statute, let us see whether the acts necessary to constitute a valid purchase or entry of land were performed by Sims.

The first act to be performed towards the completion of the purchase on his part was to file a written application for the land. Did Sims do this?

The witness, Ready, who was in a situation to know, and who did profess to be familiar with Sims' operations at the land sales, says that Sims, after the public sales, applied for sundry lands, including those in question; that he intended to bid for those lands if any one else did so, but as there were no bids he let them pass. Applied to enter them after the sales; there were also other applicants for the same lands, or at least a part of them; they were consequently put up to the highest bidder, and struck off to Sims, who received from the register, according to custom, a formal permit, which is called an application, for each eighth. That Sims had obtained from the register quite a number of these applications, and is confident that Sims applied for and entered the lands in question in good faith, and that he paid to the government every dollar of the purchase money. There is other evidence in the record corroborating the testimony of this witness, which it is unnecessary to notice, as we deem the fact that an application for the land was made by Sims is sufficiently proved by him.

The preliminary act necessary to the completion of a purchase or entry of the land was performed by Sims. The next step necessary to be taken was the payment of the purchase money to the receiver.

In reference to this point, we deem it only necessary to remark that the evidence is direct and full, that the purchase money for the land was paid by Sims, and that he took from the receiver the proper receipts, which were on file in the court below.

Upon the presentation of the certificates of the register, that Sims had made application for the lands described therein, it was, as we have seen, the duty of the receiver, upon payment of the money, to issue his receipts therefor, and on the following day, according to the regulations of the land office, to hand these receipts to the register, with the written application of the purchaser. It was also his duty, on the payment of the money, to deliver duplicate receipts to the purchasers: 2 Land Laws, 444.

In our view of the subject, the applications made to the register for the purchase of these lands, and the payment of the

money to the receiver upon filing with him the certificates of application, were a full performance of all the acts necessary to a completion of the sale, or entry, on the part of Sims. His duties terminated with the payment of the price of the land to the receiver. He was not responsible for what afterwards was to be done by the vendor; his rights, therefore, so far as the United States were concerned, could not be impaired by the ignorance, negligence, or want of fidelity on the part of the government or its officers.

We hold, therefore, that Sims by these transactions was vested with a valid claim to the land, which we must sustain, unless it is established by the proofs that the defendant was a *bona fide* purchaser, without notice of the prior equitable title which Sims held to the land.

We will, in the last place, notice the evidence in reference to the question of notice. The witnesses, Downing and Ready, swear directly and positively, that the defendant had notice of Sims' purchase or entry. The first of these witnesses swears that the defendant stated to him, that he had been informed by Sims himself, that he (Sims) had purchased or entered the land in question; and thinks that he was informed of that fact by the defendant at the time he entered the land. Ready's testimony is not less explicit: he swears that soon after the land sales at which Sims purchased the land, defendant "proposed to purchase of Sims the four eighths" in controversy; and remembered being present on one or more occasions when the subject was under consideration. With this evidence there is no testimony in the record that necessarily conflicts. There is some negative testimony, which is entitled to very little weight, if brought in conflict with the direct testimony of these two witnesses whose credibility is entirely unimpeached.

After a careful review of the case, we believe the decree of the vice-chancellor to be correct, and therefore affirm it.

YERGER, J., having been of counsel in the chancery court, took no part in the decision of this case.

PUBLIC LANDS—MISCONDUCT OF LAND OFFICERS.—Omission of register to mark a sale of land on township map does not affect the rights of the purchaser, though the land has afterwards been sold to another; and where the purchaser, of public lands pays his money and receives from the public officer a receipt for it, and a certificate that he is entitled to purchase, the sale is complete, although the evidence of it can not be made out in a prescribed form: *Kittridge v. Breaud*, 39 Am. Dec. 512. See also *Thompson v. Schlater*, 23 Id. 556; *Stark v. Mather*, 12 Id. 567; *Perry v. O'Hanlon*, 49 Id. 100.

WANT OF NOTICE OF PRIOR SALE OF PUBLIC LANDS will not give a second purchaser any claim when it arose from an omission of the register, and not from want of diligence in the first purchaser: *Kittridge v. Breaud, supra*; and where applicant for patent has knowledge of prior claim which he conceals from the commissioner of the land office, the benefit of the patent will inure to the prior claimant: *Id.* Possession is notice of title: *Bruner v. Manlove*, 36 Id. 551; *Hardy v. Sumner*, 32 Id. 167; *Johnston v. Glancy*, 28 Id. 45, and notes.

DOE EX DEM. SHELTON v. HAMILTON.

[23 MississippI, 496.]

SALE MADE UNDER EXECUTION ISSUED AFTER DEATH OF DEFENDANT, without a revival of the judgment, is not void, but only voidable; and such sale will be valid until regularly set aside by an action for that purpose brought by the heir or the terre-tenant.

LEVY ON PERSONAL PROPERTY SUFFICIENT TO SATISFY EXECUTION is *prima facie* a satisfaction of it.

JURY MUST FOLLOW INSTRUCTIONS OF COURT in rendering a verdict.

APPEAL from the circuit court of Hinds county. The facts are stated in the opinion.

John Shelton, for the plaintiff.

L. V. Dixon, for the defendant.

By Court, YERGER, J. The plaintiff in error commenced an action of ejectment in the circuit court of Hinds county, for the recovery of a tract of land. He claimed title by virtue of an execution sale against Ethelwin Sadler. After introducing the judgment and execution against Sadler, and the deed of the sheriff for the land to him, he rested his case; and the defendant then proved that Sadler had been dead several years before the last issuance of the execution by which the land was sold. The court charged the jury that "a purchase made under an execution tested and issued after the death of the defendant whose property was sold, and without revival, though previous executions may have issued in his life-time, did not create any title, and that they must find for the defendant."

This charge was erroneous. It was held by this court as early as 1837, that a sale of land made under an execution issued and tested after the death of a defendant, without a revival of the judgment, was not void, but only voidable; and that a sale under it was good until regularly set aside, which could not be done in a collateral proceeding; but must be in a direct suit for that purpose by the heir or terre-tenant.

In *Smith v. Winston*, 2 How. (Miss.) 601, this doctrine has been reaffirmed several times by this court, and we do not feel at liberty to disregard its adjudications: *Drake v. Collins*, 5 Id. 256; *Harrington v. O'Reilly*, 9 Smed. & M. 218 [48 Am. Dec. 704].

The case of *Erwin v. Dundas*, 4 How. 58, decided by the supreme court of the United States, has been pressed upon our consideration. That case went up from Alabama, and the supreme court held that a sale of lands made in Alabama, by virtue of an execution tested after the death of the defendant without revivor, was absolutely void, and not merely voidable. While we entertain a proper respect for the opinions of the supreme court, and are willing to yield to them the deference which is due to so distinguished a tribunal, yet when its decisions come in conflict with those of this court, in relation to questions over which the jurisdiction of this court is ample and its decisions final, we feel bound to adhere to our own decisions. Any other rule would subject the opinions of this court to a degree of fluctuation and change greatly to be deplored. Retrospective legislation has always been deemed unjust and oppressive. Whenever courts of justice alter or change the rules of law they have once established, and on the faith of which contracts have been made or rights acquired, many of the most injurious effects of retrospective legislation will result from such action. Entertaining this opinion, whatever views we might have been inclined to take of the question presented in the charge of the circuit judge, if it had been one of the first impression, we shall adhere to the rule laid down by this court in the case of *Smith v. Winston*, before referred to.

But it is said that the record shows that the judgment, by virtue of which the plaintiff in error claims title, had been previously satisfied by the levy of an execution on the personal property of the defendant, which was undisposed of. In looking at the record, we find that in July, 1838, an execution was levied by the sheriff of Newton county on six hundred and thirty-eight and ninety hundredths acres of land and two slaves, Ephraim and Martha, and the sheriff returned that the sale of this property was postponed by plaintiff till the execution was out of date. In June, 1843, a *venditioni exponas* was issued, commanding the sale of this property. The land was sold under it for five dollars, and the sheriff then in office returned that the slaves Ephraim and Martha were not and had not been in his possession, and were not to be found in his county. The record presents no other

proof in relation to these slaves, their value, or the disposition made of them. We have held frequently, that a levy on personal property sufficient to satisfy an execution is *prima facie* a satisfaction of it, and we still adhere to this rule. If the property levied on was not of value sufficient to satisfy the execution, it is only a *prima facie* satisfaction to the value of the property levied on. In this case the levy on the two slaves was certainly a *prima facie* satisfaction to the value of the slaves. What that value was we have no means of ascertaining from the record. That was a question which ought to have been submitted to the consideration of the jury. It may be that the jury would have found that the two slaves were of sufficient value to have satisfied the execution, and if so, they should have found for the defendant. Possibly, however, the jury might have found otherwise if the question had been left to them. But under the instruction which the court gave, no question was submitted to the jury. They were instructed that the purchase made by the plaintiff, under the execution tested after Sadler's death, conferred no title, and "that they must find for the defendant." It will be seen from this, that the court decided the whole case and left nothing to be done by the jury, except to return a verdict for the defendant, which they did. It is also said that the possession of the premises by the defendant when the suit was brought was not proved. Upon looking at the bill of exceptions, we think there is a clear admission of that fact.

Let the judgment be reversed, and the cause remanded for further proceedings.

VALIDITY OF SALES UNDER EXECUTION, HOW DEFATED.—Irregularity in execution sale can be taken advantage of only by the owner of the property and those claiming under him: *Howell v. Skinner*, 40 Am. Dec. 431; and such irregularities must be corrected by direct application to the court for that purpose, and can not be taken advantage of collaterally: *Reed v. Austin's Heirs*, 45 Id. 336; *Mordecai v. Speight*, 24 Id. 266; *Blight's Heirs v. Tobin*, 18 Id. 219. In *Harrington v. O'Reilly*, 48 Id. 704, the court held that an execution sale after the death of the defendant was not void but voidable, and a stranger purchasing under such execution would be protected; and farther, that a motion to recall or quash the execution should be made by the representative of the judgment debtor, or one in privity with him. Mr. Freeman in his work on executions, section 75, says that "the general rule that none but the parties to a suit will be allowed to interfere with its management is equally applicable to the writ of execution, which may be issued at the termination of the action. None but the parties to the writ, who are liable to be injured by it, can complain of irregularities by which it may be infected." As to the time within which a motion to quash an execution may

be made, and the grounds for the same, see sections 76 and 77 of the same work.

WHEN LEVY UNDER EXECUTION OPERATES AS SATISFACTION.—A levy on property sufficient to satisfy an execution will discharge the judgment debtor: *Campbell v. Spence*, 39 Am. Dec. 301; *Witherspoon v. Spring*, 32 Id. 310; Freeman on Executions, sec. 269. As to how a levy is made on personality, see *Banks v. Evans*, 48 Am. Dec. 734; *Butler v. Maynard*, 27 Id. 104; *Trovillo v. Tilford*, 31 Id. 490.

JURY IN RENDERING VERDICT MUST FOLLOW INSTRUCTIONS of the court, and a verdict given against such direction, whatever it may be, can never avail anything: *Flemming v. Marine Ins. Co.*, 33 Am. Dec. 33; as to whether the jury must follow erroneous instructions, see note to *Armstrong's Adm'r v. Keith*, 20 Id. 133. Where the jurors misunderstood the instructions of the court, it will be sufficient ground for setting the verdict aside: *Packard v. United States*, 48 Id. 375, and note treating the subject at length.

HARDY v. THOMAS.

[28 MISSISSIPPI, 544.]

WHERE ACTION FOUNDED UPON TORT, such as assault and battery, false imprisonment, trover, and the like, is brought against several defendants, and a verdict is awarded for the plaintiff, the latter may, after verdict, enter a *nolle prosequi* as to some of them, and take his judgment against the rest.

EXECUTOR DE SON TORT WILL NOT BE PERMITTED, in action of trover brought by administrator, to give in evidence in mitigation of damages payments of debts to the value of goods still in his possession, nor will he be permitted to retain them in satisfaction of his own debt.

EXECUTOR DE SON TORT MAY PROVE CLAIM against the estate for sums paid out by him while acting in that capacity, and may demand payment from the administrator ratably with other creditors.

APPEAL from the circuit court of Monroe county. The facts are stated in the opinion.

R. Davis, for the plaintiffs.

Lindsey and Copp, for the defendants.

By Court, **YERGER, J.** The defendant in error sued Carraway, Hardy, and Williams in an action of trover for two slaves, which had belonged to John Hill, deceased, in his life-time, and upon whose estate defendant in error had administered. The proof very clearly showed a trover, and conversion of the goods by Hardy and Williams, after the death of Hill, but there was no proof to charge Carraway. The jury found a verdict against all the defendants. A motion was made for a new trial, which the court would have granted, but that the plaintiff agreed to enter and did enter a *nolle prosequi* as to Carraway. On the trial the

defendant Hardy proved that he had paid debts to a considerable amount against the estate of Hill, after the trover and conversion by him, he having been sued as executor *de son tort* of Hill, and compromised the suits with the parties, and he asked the court below to charge the jury that he was entitled to have such payments allowed in mitigation of damages. This the court refused. Two errors are assigned in this court as having been committed by the circuit judge: 1. In permitting the plaintiff to dismiss as to Carraway, and rendering judgment against the other two defendants; 2. In refusing to give the charge above referred to, asked for by defendants. In relation to the first point, we find the rule of law laid down in *Salmon v. Smith*, 1 Saund. 207, and we concur fully in the opinion there expressed, "that where any action founded upon a tort, such as assault and battery, false imprisonment, trover, and the like, is brought against several defendants, though they all join in the same plea, and be found jointly guilty, yet the plaintiff may, after verdict, enter a *nolle prosequi* as to some of them, and take his judgment against the rest." We do not think, therefore, that there was error in permitting a *nolle prosequi* as to Carraway, and giving judgment against the other two defendants.

In regard to the second point, we will remark that it is true it is laid down in some of the elementary writers, that an executor *de son tort*, in an action of trover brought against him by the rightful administrator, can not plead payment of debts, etc., to the value, etc., or that he hath given the goods in satisfaction of the debts, etc., yet that he may, upon the general issue pleaded, recover such payments in damages, and if they amount to the full value, he may nonsuit the plaintiff: Bull. N. P. 48. But the rule is also laid down that in trover, by a rightful administrator against an executor *de son tort*, he could not give in evidence, in mitigation of damages, payment of debts to the value of the goods still in his possession, but only such as were sold: Id.; Lomax on Executors, 363, 364.

Nor could he retain in satisfaction of his own debt, because he would not be permitted to profit by his own tortious acts: Lomax on Executors, 365. The proof in this case showed that the defendant was still in possession of the goods, and had not parted with them in payment of debts, and he could not, therefore, prevent a recovery by showing payment of debts to their value, upon the most favorable rule before laid down. But it may well be questioned whether, under our statute prohibiting administrators to sell without an order of the probate court, and declaring

a sale void without such an order, an executor *de son tort* could give in evidence, in mitigation of damages, the fact that he had sold the goods in payment of debts. At common law, an administrator or executor might sell goods at private sale, and hence it was held, if the rightful administrator brought trover against the executor *de son tort*, he thereby admitted his possession of the goods to be lawful, and if the executor *de son tort* showed a sale of the goods in payment of debts, that was a distribution of them in accordance with the law, and negatived a conversion. But it would seem, where a sale even by a rightful administrator of this kind would be void, a sale by an executor *de son tort* could not be otherwise than illegal and void; and therefore would amount to a conversion.

Any other rule than this would enable an executor *de son tort* to convert the whole estate to the payment of a single creditor, and in case the estate proved insolvent, would enable such creditor to obtain payment of his debt to the exclusion of all other creditors. The impolicy of such a rule is manifest. If a party see fit, without authority of law, to intermeddle with an estate, to pay debts, and sell property for that purpose, all he can rightfully ask is the privilege of proving a claim against the estate for the sums so paid, and demanding payment from the administrator ratably with the other creditors. We do not think, therefore, the court erred in refusing the instruction on this point.

Let the judgment be affirmed.

EXECUTOR 'DE SON TORT, LIABILITY OF.—An executor *de son tort*, if sued in trover by the lawful executor for goods of the estate, can not plead payment of the debt of the deceased: *Glenn v. Smith*, 20 Am. Dec. 452. But where such an executor is justified in paying debts of the deceased, he may plead *plene administravit* as against creditors: *Id.* An executor *de son tort* can not retain property belonging to the decedent's estate for a debt due to himself: *Id.*; *Turner v. Child*, 17 Id. 555; *Givens v. Higgins*, *Id.* 742; *Arnold v. Arnold*, 55 *Id.* 434, and notes referring to other cases in this series.

THOMAS v. BURRUS.

[23 MISSISSIPPI, 550.]

WHERE POWER HAS BEEN GIVEN TO APPOINT TO OFFICE and the same has been exercised, any subsequent appointment to the same office will be void unless the prior incumbent has been removed and the office becomes vacant.

APPOINTMENT TO OFFICE OF GUARDIAN OR ADMINISTRATOR IS VOID where the same has been exercised previously, and the party so appointed has not been removed, nor the office declared vacant.

WHERE APPOINTMENT TO OFFICE IS VOID, the acts of the appointee will also be void, and the sureties on his bond will not be deemed liable.

APPEAL from the circuit court of Yazoo county. The facts are stated in the opinion.

R. S. Holt, and N. G. and S. E. Nye, for the appellant.

W. R. Miles, for the appellee.

By Court, YERGER, J. The plaintiff in error was sued as the surety of John H. Walker, upon an alleged bond given by Walker as guardian of Virginia C. Hope. The instrument bears date on the twenty-seventh day of December, 1836, and is in the usual form of guardian bonds under the statute. Among other pleas, the defendant pleaded *non est factum*, intending thereby to question the validity of the instrument, upon the ground that the order of the probate court appointing Walker guardian was an absolute nullity; that Walker, by virtue of that order, had no power or authority to act as guardian; and therefore, that the defendant was not liable for any non-performance by Walker of the duties of a guardian. On the trial, the defendant below offered to read in evidence the copy of an order of the probate court of Yazoo county, made at the February term, 1835, appointing Narcissa Hope guardian of Virginia C. Hope, approving her bond, etc. Also, an order of the same court, made at the January term, 1837, revoking these letters of guardianship; and also an order of the same court, made at the December term, 1836, appointing Walker guardian of the minor, and approving his bond, etc. He also, at the same time, offered to prove by the clerk, and to show by the records, that the above were the only orders or decrees in said court appointing Walker guardian, or in any way revoking or annulling the order of appointment of Narcissa Hope. The court on motion rejected this evidence, to which an exception was taken.

It will be seen from this statement of the evidence rejected by the court below, that at the time John H. Walker was appointed guardian, and the instrument sued on made by the defendant, that Narcissa Hope was then the rightful guardian of the ward, by virtue of a valid, unrevoked order of appointment. This being the case, had the probate court any power

to make another appointment? We think not. The act appointing Narcissa Hope guardian at the February term, 1835, exhausted the whole power of the probate court in the premises. While that appointment remained, and until the removal of Mrs. Hope in the manner prescribed by law, she had the sole and entire right to control, regulate, and manage the estate of the minor; and the order appointing Walker, under such circumstances, was *coram non judice*, and void.

In accordance with this view was the opinion of the court in the case of *Vick v. City of Vicksburg*, 1 How. (Miss.) 379 [31 Am. Dec. 167], where the court held that the appointment of an administrator with the will annexed, during the life-time of the executor, except upon the contingencies named in the statute, was without authority and void; and that all the acts of such administrator would be absolutely illegal and void, and those of a trespasser. The supreme court of the United States, in the case of *Griffith v. Frazier*, 8 Cranch, 9, held the like rule. In Tennessee, in the case of *Bledsoe v. Britt*, 6 Yerg. 463, Judge Green used this language: "Mrs. Britt had been appointed guardian of the wards, and there appeared no order showing that she had been removed. In conferring the appointment upon her, the court exhausted its power, and could not confer any right to act as guardian upon the plaintiff until the removal of the former guardian; then, and not before, the right to act upon this subject should be resumed." The same court held, in the case of *Lewis v. Brooks*, Id. 167, that the grant of administration *de bonis non*, where all the administrators are not dead or have not surrendered the trust, is void. Indeed, it seems so clear upon principle that authority is not needed to sustain the position, that where the power given to appoint an officer has been exercised, any subsequent appointment must be void, unless the prior incumbent has been legally removed and the office become vacant.

Inasmuch, then, as the appointment of Walker was a nullity, he had no power to exercise any act of guardianship by virtue of such appointment. He could not maintain any action for the recovery of the ward's estate. He had no authority or right to receive any money due to it, and a payment to him by any one on such account would have been no discharge; the rightful guardian could have compelled the party to pay a second time. Is Thomas liable, then, for any non-performance by Walker of the duties of guardian? Surely not. And for this plain reason Walker had no right or authority by law to do any

act as guardian; and any act done by him, by virtue of the appointment aforesaid, was absolutely null and void.

But it is said, the recital in the instrument that Walker, as guardian, should account, etc., estops Thomas from denying that Walker was guardian, and his consequent liability as surety.

It is certainly true, that where a party makes a distinct and clear recital of any fact in a deed or other valid obligation, he will be estopped from denying the truth of such recital. But this doctrine presupposes a valid or legal obligation, and we do not know any authority, and reason certainly is against the position, that a party is estopped by any recital contained in an instrument from showing that the instrument containing it is absolutely null and void. In this case, if the probate court had no power to appoint Walker guardian, and if the order of appointment was void, it had no power to take or accept the bond, and having no such power, the acceptance was a void act, and could not fix any liability on Thomas.

While this court will, in all cases, hold guardians and their sureties to a strict performance of their trusts, it must at the same time so administer the law as not to impose obligations or duties upon parties where none have been assumed according to law.

Let the judgment be reversed, and a new trial awarded, and the cause remanded.

APPOINTMENT OF OFFICER, PRIOR ONE BEING UNREVOKED, EFFECT OF.—
On general principles, the choice of a person to fill an office constitutes the essence of his appointment. Acceptance by the appointee need not be signified in express terms; it is often implied from the appointee's conduct. It must be obvious, also, that when once accepted, no vacancy can be said to exist in the office till the term of service expire, or till the death, removal, or resignation of the person so appointed: *Johnston v. Wilson*, 9 Am. Dec. 50.

SALE v. SAUNDERS.

[24 MISSISSIPPI, 24.]

CONSTRUCTION OF WILL MADE IN ALABAMA in relation to property in that state at the testator's death must be such as would be given to it by the courts of Alabama.

HUSBAND HAS ESTATE FOR LIFE, IN ALABAMA, IN SLAVE bequeathed by a testator to his daughter and her husband during their natural lives, free from the debts of the husband, and to the survivor during his or her natural life, and the slave is subject to sale on execution against him.

WIFE BY VIRTUE OF HER SURVIVORSHIP CAN MAINTAIN ACTION for slave against a purchaser at an execution sale of the slave against her husband, where the slave was bequeathed to her and her husband for their natural lives and to the survivor during his or her natural life.

REVERSIONARY INTEREST OF WIFE IN PERSONAL PROPERTY or an estate limited to her upon a condition which can not take effect until the death of the husband is not subject to sale on execution for the debts of the husband; therefore, where a slave is bequeathed to the testator's daughter and her husband for their natural lives and to the survivor during his or her natural life, the estate which the wife takes by virtue of her survivorship is not subject to sale on execution against the husband during his life.

ERROR from the Monroe county circuit court. The opinion states the case.

Goodwin, and Harris and Harrison, for the plaintiff in error.

Lock E. Houston and Stephen Adams, contra.

By Court, YERGER, J. In the year 1831, Joseph Saunders, who resided in the state of Alabama, made his last will and testament, which was duly probated in that state, and among other bequests contained in it, was one of a slave, in the following words: "I give and bequeath unto James E. Saunders, as trustee of my said daughter, Lucy Fenner, and her husband, to be enjoyed and used by them during their natural lives, free from any liability for the debts of her said husband, and by the survivor of them during his or her natural life," etc. The slave so bequeathed was sold in the state of Alabama during the life-time of Fenner, as his property, by virtue of an execution on a judgment against him, and the plaintiff in error became the purchaser. Fenner, the husband, died, and this suit was brought by Saunders, the trustee, to recover the slave for the use of Mrs. Fenner, who has survived her husband, and a judgment rendered in his favor. It is insisted by the counsel for the plaintiff in error, that, by the decisions of the supreme court of Alabama, Fenner, the husband, had not only an estate in the slave during the joint lives of himself and wife, which could be sold by an execution at law, but also an estate during the life-time of his wife, in the event of her surviving him, equally subject to the payment of his debts by execution at law; and that the plaintiff in error, by virtue of the sale made in this case, has become the owner of that estate, and can hold the slave by virtue thereof against the surviving wife or her trustee. As this will, and the sale, by virtue of which the plaintiff in

error claims, were made in Alabama, of course the rights of the parties to the slave must depend upon the laws of that state.

Upon examining the cases to which counsel have referred us, we find that the supreme court of Alabama has held that the conveyance of a slave, "in trust for the joint use of the husband and wife for their lives, remainder to the survivor, and remainder in fee to the issue of the marriage," vests in the husband an estate for life, which may be sold at law by virtue of an execution against him: *Branch Bank v. Wilkins*, 7 Ala. 589; *Harkins v. Coalter*, 2 Port. 463.

It may be remarked that the construction thus given by the courts of that state to such conveyances is opposed to the rule established by the supreme court of Virginia in regard to them. It has been held by the latter court in several cases, that by "a conveyance of slaves to the joint use of the husband and wife during their lives, with remainder to the survivor," the husband and wife each become seised of the entirety, and that the wife has such an interest in the estate that the husband can not dispose of it without her consent, nor can it be sold for the debts of her husband: *Scott v. Gibbon*, 5 Munf. 86; *Roanes v. Archer*, 4 Leigh, 550.

It is also opposed to the common-law doctrine in relation to conveyances of real estate, by similar words, the rule in regard to which has been stated by Chancellor Kent in the following language: "The same words of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety. Both are seised of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole:" *Rogers v. Benson*, 5 Johns. Ch. 437. See also 2 Bla. Com. 133; *Back v. Andrew*, 2 Vern. 120; *Taul v. Campbell*, 7 Yerg. 332 [27 Am. Dec. 508].

As we are called upon, however, in this case, to give a construction to a will made in Alabama, in relation to property in that state at the testator's death, we must give to it that construction which would be given to it by the courts of Alabama; and without intending to express any opinion as to the rights which a husband would acquire under a will or conveyance of property in this state, containing similar language to that in the will before us, we do not doubt that in Alabama the husband had an estate for life in the slave subject to sale by execution at law against him.

This brings us to the consideration of the second question presented by this record. Can the wife, by virtue of her sur-

vivorship, maintain an action for the slave against a purchaser at execution sale against the husband? We think she can. We have carefully examined the cases in Alabama cited for the plaintiff in error, but do not find in them, or in any other decision in that state, that the contingent estate limited to the wife in the event of her survivorship was subject to sale by the husband, without the consent of the wife, or by the creditors of the husband. In the case of *Hale v. Stone*, 14 Ala. 803, and chiefly relied upon by counsel, the court merely decide that the intervention of a trustee will not have the effect, in the absence of a declared intention to exclude the husband, to vest in the wife a separate estate; and "if the wife, by the terms of the gift, be entitled to the usufruct in the property, and the same comes to the possession of the husband, the wife's interest, whether for years, for life, or in fee, may be sold under execution at law against him." This language merely declares the old rule on this subject, and the case comes very far short of deciding that the reversionary interest of the wife in personal property, or an estate limited to her upon a condition which could not take effect until the death of the husband, was subject to sale for the debts of the husband.

It is true, that, by the rules of the common law, the rights of the wife were so completely merged in the husband that he became the owner of all the personal property she had at the date of the marriage, or subsequently acquired, and also of such choses in action belonging to her as he might have reduced to possession; but, in regard to such choses in action as were not reduced to possession, the same survived to the wife. Now, in regard to estates granted to the wife upon a contingency that could not happen during the life-time of the husband, it is clear, inasmuch as no title or estate could vest in the wife until his decease, that she had no property or right in action capable of being reduced to possession by him, and that he could not, therefore, have any interest or property in such contingent estates which his creditors could reach. Certainly no legal estate could vest in him in right of his wife, inasmuch as none could vest in her until the happening of a contingency, which could not take place until after or at the period of his decease.

A distinguished law-writer has remarked, in relation to the wife's right of survivorship in reversionary estates, that "all the decisions deny the absolute power of the husband to bar the rights of the wife by an assignment for valuable consideration;" and in many of the decisions, his power to do so, even with the

consent of the wife, has been denied: Clancy on Husband and Wife, 144-146.

If the husband, without the consent of the wife, could not dispose of her interests in reversion, so as to bar her right of survivorship, *a fortiori* a creditor of the husband, by means of a forced sale at execution, could not acquire any other right or interest than a voluntary sale by the husband would convey.

These cases seem to be based upon the principle, that until these estates in reversion vested in the wife there was no interest or property therein capable of being reduced into possession by the husband; and that unless he could reduce them into possession, he could do no act, without consent of the wife, which would bar her right by survivorship. Upon this point, the case of *Hornsby v. Lee*, 2 Madd. 16, the decision of the master of the rolls will be found conclusive, and his reasoning clear and satisfactory. In that case the husband and wife made an assignment of the wife's reversionary interest in some government stock. After the death of the husband and of the person on whose death the wife was to take, the wife claimed the stocks as survivor against the assignee of her husband and herself; and it was held she was entitled to recover, because she had not such an interest in the stocks as could have been reduced into possession, and therefore, not such an interest or estate as could be assigned by the husband so as to bar her right.

The principle decided there is fully applicable to the case at bar. For, while it is true that in the case cited the interest of the wife was a reversion in choses in action, and in the case before us it is an estate in a slave, yet it is an estate dependent on a condition which can not take place till the death of the husband, and therefore, a right or interest which it is impossible that he could reduce to possession.

But if it were conceded that the husband had acquired a title by virtue of his marital rights, which he could sell and dispose of, it does not follow that it is such an estate as could be sold by virtue of an execution at law against him. Indeed, we incline very much to the opinion that it could not. In Tennessee, where this question has arisen, it has been held that "a remainder in slaves can not be levied on and sold by execution at law:" *Allen v. Scurry*, 1 Yerg. 36 [24 Am. Dec. 436]. In that case the court said: "The remainder or reversion of a live chattel is a pure contingency, a bare possibility whether it will ever exist or not. On the part of the purchaser it is a perfect hazard; the thing acquired may be of some value, or it may be of none; and

a sale under such circumstances would be a gaming transaction, subversive of good morals, ruinous in its consequences, and injurious to the rights of other creditors, by the sacrifice of that fund, which, in proper time, might be competent to the satisfaction of all their claims;" and hence the court concludes that a remainder in a slave, being a mere contingent or possible estate, incapable of seizure by the sheriff, and in this respect, like a chose in action, is not subject to sale by execution, according to the principles of the common law.

If the principle of this decision be applied to the case before us, it is obvious that any estate or interest which the husband could have in the remainder, limited to his wife and dependent upon her survivorship, was entirely uncertain and contingent, a bare possibility, which might or might not be fixed at a future day, an incorporeal and intangible estate, incapable of seizure by the sheriff, and therefore, by the rules of the common law, not a subject of levy and sale. We see no error in the judgment below.

Let the judgment be affirmed.

RIGHT OF HUSBAND OVER WIFE'S PROPERTY: See *Burleigh v. Coffin*, 53 Am. Dec. 236; *Howard v. North*, 51 Id. 769; *Barnes v. Simms*, 49 Id. 435; *Leakey v. Maupin*, 47 Id. 120.

LIABILITY TO EXECUTION OR ATTACHMENT OF WIFE'S PROPERTY FOR HUSBAND'S DEBTS: See *Howard v. North*, 51 Am. Dec. 769; *Arrington v. Screws*, 49 Id. 408; *Smith v. Poythress*, 48 Id. 176; *Flory v. Becker*, 45 Id. 610; *Jackson v. McAliley*, 40 Id. 620; note to *Coplinger v. Sullivan*, 37 Id. 581.

RIGHT OF PURCHASER AT EXECUTION SALE OF WIFE'S PROPERTY FOR HUSBAND'S DEBTS: See *Bush v. Bush*, 51 Am. Dec. 675; *Weeks v. Haas*, 39 Id. 39.

LAW GOVERNING WILLS: See *Mahoneg v. Hooe*, 48 Am. Dec. 706.

CONVEYANCE FOR MUTUAL SUPPORT OF HUSBAND AND WIFE, and to survivor, rights of husband under and liability of property to sale on execution: See *Moses v. McCall*, 46 Am. Dec. 272.

BLAND v. MUNCASTER.

[24 MISSISSIPPI, 62.]

ORDER OF PROBATE COURT CONFIRMING EXECUTORS' SALE must be treated as final and conclusive until reversed or vacated.

FAILURE OF EXECUTORS TO GIVE NOTICE OF SALE prescribed by the statute does not render the sale void.

PURCHASE BY EXECUTOR ON SALE OF TESTATOR'S PROPERTY IS VOIDABLE, but not void; the sale can be set aside at the suit of a creditor only upon his showing that it was not fairly made, and that without a resale, the estate would be insufficient to pay the debts existing against it.

PURCHASE BY EXECUTOR ON SALE OF TESTATOR'S PROPERTY IS VALID AFTER CONFIRMATION by the probate court, until the order of confirmation is in a proper manner vacated, and this can not be done in a collateral proceeding in the circuit court except for fraud in procuring the order.

ERROR from the Claiborne county circuit court. The opinion states the case.

J. B. Coleman and George Yerger, for the plaintiff in error.

H. T. Ellett, contra.

By Court, FISHER, J. This was an issue in the circuit court of Claiborne county between M. W. Bland and wife, as claimants, and C. W. Muncaster, plaintiff in execution, to try the right of property to certain slaves levied on by the sheriff of said county, by virtue of an execution emanating upon a judgment rendered in said court on the twenty-ninth of November, 1841, for one thousand nine hundred and one dollars and thirty cents, against Passmore Hoopes and Stephen Douglass, as executors, and Emeline Douglass, as executrix, of the last will and testament of James S. Douglass, deceased. The execution appears to have issued on the nineteenth of February, 1846, and was a few days thereafter levied upon eight slaves as the property of the testator, which were claimed by the plaintiffs in error as the property of Mrs. Bland.

It appears from the bill of exceptions that on the twenty-fifth of February, 1840, the executors obtained an order from the probate court of said county, authorizing them to sell all the personal estate of the testator; that by virtue of this order the executors, Hoopes and Douglass, on the twentieth of March, 1840, made a sale of said estate, when Mrs. Douglass, now Mrs. Bland, became the purchaser thereof, at the sum of thirty-three thousand two hundred and forty dollars and fifty cents. An account of the sale was made to the March term, 1840, of the probate court of said county, and in all things confirmed.

It also appears by the proof in the record that Mrs. Douglass resigned her letters testamentary on the day the order of sale was granted; but there is nothing in the record showing that she had previously given the notice of her intention to resign as required by the statute.

This state of facts presents two questions for our consideration: 1. Whether the failure to give thirty days' notice of the time and place of the sale rendered it void; and, 2. Whether the

purchase by Mrs. Bland was void or voidable, admitting the order of the court, showing her resignation to be invalid.

As to the first question, it would perhaps be sufficient to state that the order of the probate court, confirming the sale, must be treated as final and conclusive until reversed, unless the same be vacated, for fraud or other matter, which would render it void. Our investigation of this part of the case will first be directed to the return of the sale and the record of the court confirming it. The fact clearly appears, from the record of the probate court, that the sale was made in less than thirty days after the order of the court was obtained by the executors. The question, therefore, presents itself, whether the sale was void, or merely voidable. If void, then no doubt can be entertained as to the correctness of the verdict and judgment in the court below. If merely voidable, however, then very different questions arise for investigation. We will therefore proceed to examine the first branch of the question whether the sale was void.

It is insisted by the learned counsel for the plaintiff in execution that the executors in making the sale merely executed a power conferred upon them by the order of the probate court, and that the time for the execution of the power did not arise till the expiration of thirty days from the order authorizing the sale. It is not necessary that we should decide this point, or notice it, otherwise than as it connects itself with a fair construction of the statute on this subject. "It is a general rule of law and equity that an executor or an administrator has an absolute power of disposal over the whole personal effects of the testator or intestate," "the executor or administrator having the same property in the personal effects of the deceased as he had when living:" Lomax on Executors, 344. From this authority it will be seen that our statute to some extent conflicts with the common law, and for this reason must receive a strict construction. It can not, however, be contended that it does anything more than restrict the executor or administrator in the exercise of a power which he possessed without restriction by the common law.

The policy of our law is to give to the distributees the specific property left by the deceased. To protect the rights of this class of persons, the restrictions were imposed by the statute on the powers of executors and administrators in selling estates under their charge. The propriety or necessity of a sale must be submitted to the probate court, whose province it is to de-

termine the questions presented by the executor or administrator. As a general rule, a sale is made for the purpose of converting the property into money, to pay the debts of the deceased. And here we will remark, that it is proper to keep in view the distinction between the rights of the creditors of an estate and those interested in the distribution of the property, which the former can only ask to have converted into money for the purpose of satisfying their demands.

The section of the statute bearing on this question is in these words: "It shall be the duty of the executor or administrator to apply to the orphans' court of the proper county for an order of sale; and upon obtaining the same, to advertise the time and place of such sale," etc., "at least thirty days," etc.: Hutch. Code, p. 669, 670. The section further provides, that when it shall be necessary to sell the whole or any part of the estate, the application shall be made as above quoted. Here the question may be asked, When is it necessary for the executor or administrator to sell the whole or part of the estate? The answer is, When the demands of creditors shall require it. The court, therefore, in ordering a sale, to some extent pronounces a judgment in favor of the creditors, and against those interested in the distribution. It would, therefore, seem that creditors who are benefited by the judgment should not complain of it, but only those against whom it may operate prejudicially. But no question is raised as to sufficiency of the order of the court, but only as to the action of the executors under it. Our remarks, however, will be found to apply as well to the execution of the order as to the order itself; because, if made for the benefit of creditors, it must also be executed for their benefit. And this brings us to the important question, to wit, the failure to give the thirty days' notice of the time and place of the sale. The statute already quoted says that it shall be the duty of the executor or administrator to obtain the order of the orphans' court, and to give thirty days' notice of the sale, etc.

We will next cite the statute regulating sales by sheriffs, which has received the adjudication of this court. It is in these words: "And the sheriff or other officer shall give, in the case of personal property, at least ten days' public notice, and in case of lands at least thirty days," etc.: Hutch. Code, 902, sec. 22. The language of these statutes is, in meaning, the same. In the case of *Minor v. The Selectmen of Natchez*, 4 Smed. & M. 619 [43 Am. Dec. 488], this court held that a failure to adver-

tise land, or to give the notice required by the statute, did not vitiate the sale made by the sheriff. The language of the two statutes being almost identical, and certainly the same in meaning, a construction of one must necessarily be a construction of the other. Both the sheriff and the executor or administrator must conform to the requirements of the law, as to the mode of selling property in their official character by public sale; whether a sale thus made will be upheld must, of course, depend upon the circumstances surrounding it. It may certainly be fair, and the property bring a full price upon even less notice than that required by a sheriff on a sale of personal property. If the failure to give the notice in the mode pointed out by law renders the sale void, then the notice is a condition precedent to the sale, and constitutes an important link in the purchaser's claim of title. This rule would not only be inconvenient in its operation, but would deter persons from purchasing property at public sales, as but few could ever certainly know that notice conforming to the letter of the law had been given. We are therefore of opinion that the failure to give the notice did not render the sale void; and if voidable, the plaintiff in execution having no ultimate right in the property, but only in a fair conversion of it, must show that this conversion was not fairly made; or an injury which will be sustained by him if the sale is permitted to stand. For it may be true that the legatee or distributee can avoid the sale, but it does not follow that the creditor can do so. The property has already been converted for the benefit of the creditor, in a manner apparently legal, and at the same time beneficial to the interest of distributees, by a public sale and on a credit. To grant the demand of the creditor in this case, one of these advantages, a sale on a credit, would be lost to the distributee, for whose benefit we have already seen the statute requiring an order of the orphans' court before a sale was enacted.

We deem it unnecessary to decide the other question made as to the validity of the resignation of Mrs. Douglass, of her letters testamentary, as it relates entirely to her power to purchase at the sale of her testator's estate. If she possessed no power to purchase, it is very clear that she acquired no title to the slaves in controversy. But we are of opinion that her purchase was not void, but only voidable. Under this view of the question, the sale could only be set aside at the suit of a creditor upon his showing that it was not fairly made; and that without a resale the estate would be insufficient to pay the debts existing

against it, and this upon the plain principle that a party can never invoke the aid of a court of justice except to place him in the possession or enjoyment of a right withheld by the adverse party. If the proceeds of the sale are sufficient to pay the debts of the estate, then creditors have no right to question its validity, as there has been an act of administration in discharge of the first duty required of the executors, viz., to pay the debts of the deceased.

We have said that Mrs. Douglass' purchase was not void, but only voidable. As this is a new question in this court, we will cite some of the authorities on this point. In the case of *Baines v. McGee*, 1 Smed. & M. 218, this court said: "It is conceded in argument, that the purchase of property by an administrator at his own sale is voidable for purposes of justice. This admission is certainly not repugnant to law, and goes far enough for the present case. Whether we would go further, and pronounce such a purchase void, we leave to be determined when it becomes necessary to pronounce an opinion."

In the case of *Den v. McKnight*, 6 Halst. 385, the court said, in speaking of such purchasers, "that the expression used by the court in *Den v. Wright*, 2 Id. 175 [11 Am. Dec. 146], that such sales and conveyances are void, is too strong. They are voidable, not void. They may be avoided by the *cestuis que trust* or their heirs. Strangers or third persons can not impeach or question them." The same principle was recognized in the case of *Litchfield v. Cudworth*, 15 Pick. 31, where the court said "that trustees of every description, who have power to sell, can never, by direct or indirect means, become the purchasers of trust property. But this principle does not render the sale absolutely void. Strangers to the property can not call it in question. It is voidable." Other authorities to sustain this principle might be cited; but we deem it unnecessary to do so, as we believe but few can be produced on the other side of the question.

We have examined the only important questions, the validity of the sale, and Mrs. Douglass' power to purchase, without any special reference to the instructions of the court to the jury on the several questions made in the court below. It will, however, be seen that the sale not being void, after its confirmation by the probate court, must be treated as valid till the order of confirmation shall, in the proper manner, be vacated. This, of course, can not be done by a collateral proceeding in the circuit court, except for fraud in procuring the order.

We give no opinion as to the statute of limitations constituting a bar to the remedy of the plaintiff in execution in this case, as the merits of the controversy appear to be involved in the points decided.

Judgment reversed, and *venire de novo* awarded.

PROCEEDINGS OF PROBATE COURTS, CONCLUSIVENESS OF: See *Borden v. State*, 54 Am. Dec. 217; *Cox v. Davis*, 52 Id. 199, and note; *Lynch v. Baxter*, 51 Id. 735; *McDade v. Burch*, 50 Id. 407; *Slatter v. Glover*, 48 Id. 118.

PURCHASE BY ADMINISTRATOR AT HIS OWN SALE, VALIDITY OF: See *Pennock's Appeal*, 53 Am. Dec. 561, and note; *Worthy v. Johnson*, 52 Id. 399; *Muselman v. Eshleman*, 51 Id. 493, and note.

STATUTES AUTHORIZING EXECUTORS TO SELL MUST BE STRICTLY COMPLIED WITH: *Worthy v. Johnson*, 52 Am. Dec. 399, and cases cited in note; *Stevenson v. McReary*, 51 Id. 102, and note.

COULTER v. ROBERTSON.

[24 MISSISSIPPI, 278.]

UPON DEATH OF CORPORATION, all its real estate reverts by the common law to the original grantor or his heirs; the debts due to and from the corporation are all extinguished, and all the personal estate of the corporation vests in the crown, and with us, in the people.

ACT OF LEGISLATURE PASSED SUBSEQUENT TO JUDGMENT OR FORFEITURE OF CORPORATION can not divest the powers of a trustee appointed by the court, nor the rights of creditors.

STOCKHOLDER IS NOT CREDITOR OF CORPORATION.

CONSIDERATIONS OF POLICY IN CONSTRUCTION OF STATUTES are entitled to weight only in cases of doubtful interpretation, and where the intention of the legislature appears to be opposed to the literal import of the language of the act.

DEBTS DUE CORPORATION ARE NOT KEPT ALIVE FOR BENEFIT OF STOCKHOLDERS, under the statute passed the twentieth of July, 1843, and they have no right to the surplus; their rights are left as they were at the common law; this act was for the benefit of the creditors of the corporation merely.

ON JUDGMENT OR FORFEITURE AGAINST BANK, ALL ASSETS, consisting of credits or debts due to it, chattels, and real estate, become a trust fund for the sole purpose of paying the debts due by the bank at the time of its dissolution.

POWERS OF TRUSTEE APPOINTED ON JUDGMENT OR DISSOLUTION AGAINST BANK under the act of the twentieth of July, 1843, are terminated when he has paid off and discharged the whole of the debts of the bank, and he can not sue for and recover the debts which were due to it, and which were still outstanding and unpaid.

IN ALL CASES WHERE IT IS DOUBTFUL WHAT ESTATES TRUSTEES HAVE, they are presumed to take an estate large enough to enable them to accomplish the purposes of the trust; but the trustee will never by construction be held to take a greater estate than the nature of the trust demands.

RESULTING TRUST IS NOT CREATED IN FAVOR OF STOCKHOLDERS of bank on a judgment of forfeiture against it, in the surplus of the funds after the payment of the debts, as the rights of the stockholders do not survive the forfeiture.

TRUST ESTATE, GIVEN FOR SPECIFIC PURPOSE, CONTINUES AT LAW for so long a period only as is necessary to effect the purposes of the trust.

QUESTION WHETHER DEBTS OF BANK HAVE NOT BEEN PAID AND DISCHARGED is one which a jury could readily comprehend and satisfactorily decide, in an action brought by a trustee appointed on a judgment of forfeiture against a bank against a debtor of the bank.

CIRCUIT COURT HAS AMPLE JURISDICTION TO SETTLE ACCOUNT OF TRUSTEE appointed on a judgment of forfeiture against a bank.

ERROR. The opinion states the case.

A. H. Handy, S. S. Boyd, J. Winchester, and George Calhoun, for the appellant.

J. T. McMurran, George S. Yerger, T. O. Tupper, and George L. Potter, contra.

By Court, SMITH, C. J. A judgment of forfeiture was pronounced against the late Commercial Bank of Natchez upon an information in the nature of a *quo warranto*, instituted under the provisions of the statute regulating the mode of proceeding against incorporated banks for a violation of their charters.

William Robertson was appointed trustee, and as such brought suit against the plaintiffs in error, on a note made by their testator, which was the property of the dissolved corporation, at the time when the judgment of forfeiture was rendered.

The demurrer to the second and third pleas of the defendants in the court below presents the questions which it becomes our duty to investigate. For the present, we will direct our attention to that which arises on the demurrer to the second plea. In its general form, the question thus raised is this: Had Robertson, the trustee, title to sue? Could he maintain an action on the note?

In the discussion of this proposition, two points of inquiry naturally suggest themselves: 1. Whether a full payment of the debts due by the bank, at the time of its dissolution, or the collection from the assets of an amount of money sufficient for that purpose by the trustee, was a full and complete execution of his trust, whereby he became *functus officio*; 2. Whether the trusts which had vested in Robertson were, in reality, terminated by the payment of the whole of the debts of the bank, or by the collection of funds by him sufficient for that purpose, such matter constituted the basis of a valid defense, of which the defend-

ants below had a right to avail themselves in bar of a recovery?

1. The effects or consequences at common law of a judgment of forfeiture, rendered against a corporation, have been materially modified by the legislation of this state. Hence, to enable us to respond to the first inquiry a distinct perception, as well of the consequences which followed at common law upon a judgment of forfeiture against a corporation, as of the changes produced by the statutes of our own state, is essential.

The elementary books and the numerous cases decided are uniform in their language in regard to the consequences resulting from the dissolution of a corporation. They held that upon the death of a corporation, all its real estate remaining unsold reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished. Neither the stockholders, nor the directors, nor trustees of the corporation, can recover those debts, or be chargeable with them in their natural character. All the personal estate of the corporation vests in the crown, with us in the people of the state, as succeeding, in this respect, to the rights and prerogatives of the king: Co. Lit. 13 b; 1 Bla. Com. 484; Angell & Ames on Corp. 513; *Mayor etc. of Colchester v. Seaber*, 3 Burr. 1868; *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8; *State Bank v. State*, 1 Blackf. 283 [12 Am. Dec. 234]; *Fox v. Horah*, 1 Ired. Eq. 358 [36 Am. Dec. 48]; 2 Kent's Com. 309.

This we understand to be the settled doctrine of this court. It was said by the late learned chief justice, in delivering the opinion of the court, in the case of the *Commercial Bank of Natchez v. Chambers*, 8 Smed. & M. 9, it has been urged "in argument with much plausibility, that even without the interposition of the legislature, the debts due to and from the bank would have survived its dissolution; that these commercial corporations should be regarded as partnerships, and the fund or property owned by them a trust fund which equity would appropriate to the payment of their debts. The current of decisions seems to have fallen into a different channel, and it may now be regarded as the settled doctrine, that on the dissolution of a banking corporation, the debts due to and from it are extinguished; not by an implied condition in the contract, but from necessity, because there is no person in whose favor or against whom they can be enforced."

Following the suggestion to which the remarks above quoted are a reply, counsel upon the argument of this cause assumed,

and have sustained the assumption with great ingenuity, that the obligation of contracts entered into by a corporation does not cease upon its dissolution, but continues unimpaired. And the reason assigned why they can not be enforced is this, there is no person appointed in whom the legal title vests. In other words, that the contracts continue in force, but the remedy has been lost by the dissolution of the corporation.

We do not assent to the proposition, and believe it to be unsupported by authority. There is an obvious distinction between mere credits or debts due by contract unaccompanied with a lien upon property, either general or special, and real estate, and goods and chattels. The latter are matters of substance. They have not merely an ideal being, but an actual existence; hence they may subsist independent of any ownership, either in being or expectancy. As it is not essential to their existence that there should be an owner, they are not annihilated by the extinction of the corporation to which they previously belonged, but pass upon its dissolution into the hands of those who may take them. "As they retain their being and remain the subjects of occupancy and possession, the grantor of the land can lay hold of them, and the state, through its proper agent, can take possession of the goods and chattels which belonged to such corporation. But such is not the condition or character of debts owing to such corporation; they are merely rights which rest in action—they have an ideal but not an actual existence—they are neither tangible nor the subjects of occupancy or possession:" *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 13. A debtor and a creditor are essential to the very existence of a debt. There can be neither a debt nor an obligation without there be in actual being or in expectancy, with a legal possibility of an actual existence, a person by whom the debt may be paid or the duty performed, as well as a person who may receive the payment of the debt, or accept the performance of the obligation. Wherever, therefore, the payor or payee, the debtor or the creditor, or the person by whom a duty is to be performed, or who is to accept the thing which is to be done, ceases to exist without a representative, or the legal possibility of a representative, the debt or obligation ceases to exist, and the obligation of payment or performance is forever at an end.

The case above referred to, of the *Commercial Bank of Natchez v. Chambers*, 8 Smed. & M. 9, is cited to show that the obligation of the contracts of a dissolved corporation survives its dis-

solution. The passage quoted from the opinion in that case distinctly announces the principle as the settled doctrine of our courts, that the debts due to and by a corporation upon its dissolution are extinguished. Not such is the condition of a debt where the debtor and creditor survive, but which has been barred by the statute of limitations. The legal remedy has been lost, but the moral right to demand payment and the obligation to pay remain. If the effect of the statute of limitations were held to extinguish the right as well as to bar the remedy, it is manifest that a subsequent promise to pay the debt would be void for want of consideration; for it must be perfectly immaterial whether, if a right or debt is extinguished, the effect is produced by a statute bar, the civil or natural death of one of the parties to the contract, or by a payment itself.

The case of *Mumma v. The Potomac Company*, 8 Pet. 281, has been cited for the same purpose. Mumma, the plaintiff in that case, was a judgment creditor of the Potomac Company, and after its dissolution, which was effected by a surrender of its charter, issued out a writ of *scire facias* to revive his judgment. The questions presented by the record in that case were: 1. Whether the corporate existence of the company was not destroyed, so as to defeat the rights and remedies of its creditors. 2. Whether the deed of surrender did not violate the contracts of the company, and whether the legislative acts of Virginia and Maryland, though confirmed by the act of congress, were not on that account void. Both questions were decided against Mumma, and Judge Story, who delivered the opinion of the court, in discussing the second point says: "The obligation of those contracts [the contracts of the defunct corporation] survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company or the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." This case was cited in the opinion of this court in *Nevitt v. The Port Gibson Bank*, 6 Smed. & M. 513, and appears to have been regarded as an authority in support of the position that the obligation of contracts entered into by and with corporations survives their dissolution. We think upon examination it will be perceived that the import of the decision was misunderstood, and that Judge Story was very far from intending to intimate that, according to the common law, upon the dissolution of a corporation the debts due to and by it would not be extinguished.

The pleadings in that case showed that the Potomac Company, in pursuance and in execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, chartered by the states of Maryland, Virginia, and by the congress of the United States, had conveyed in due form of law to the said company all of its property, rights, and privileges of every description whatever; and had also, in due form, made a surrender of its charter; which transfer and surrender was accepted by the Chesapeake and Ohio company. The acts incorporating this latter company distinctly show that the assignment or conveyance was for the benefit of its creditors and stockholders. Upon the acceptance of the transfer, an equitable lien attached to the property assigned in the hands of the Chesapeake and Ohio Canal Company in favor of the creditors of the former company; whose debts or claims against it were thus preserved from extinguishment by the provisions of the acts creating the charter of the Chesapeake and Ohio Canal Company, and providing for the transfer. Hence, it was very properly said by the distinguished judge, that "the creditors of the Potomac Company might enforce their claims against any property belonging to the corporation which had not passed into the hands of *bona fide* purchasers; but was still held in trust for the company, or the stockholders thereof, at the time of its dissolution, in any mode permitted by the local law." Besides, the twelfth section of the act incorporating the Chesapeake and Ohio Canal Company makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac company who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do), to pay such creditor or creditors annually such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors at that time may bear to the whole debt of one hundred and seventy-five thousand eight hundred dollars [the supposed aggregate amount of the debt of the Potomac Company]." "So that," continues the judge, "here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues, in the only mode in which it could be practically done upon its dissolution." In fact, the legal title of the whole property of the Potomac Company vested

in the Chesapeake and Ohio Canal Company, upon the terms prescribed by the charter, who held it in trust for the creditors and stockholders, whose interests were looked to in making the arrangement. The case was not materially different in principle from an ordinary assignment by a corporation of its effects, for the payment of subsisting debts against it, and when, after the assignment, its corporate existence was terminated by either a surrender, a judicial forfeiture, or by the lapse of time.

The decision in the case of *Bleakney v. The Farmers' and Mechanics' Bank of Greencastle*, 17 Serg. & R. 65 [17 Am. Dec. 635], was cited and relied on as authority upon the same point. Upon a careful examination, we have been unable to perceive its application. It appears that the bank had omitted to pay, as required by law, six per cent. to the state on the amount of its dividend in November, 1819.

After this default, the bank took from Bleakney the note made by him and on which the suit was brought. The defense was based upon the alleged dissolution of the corporation, as having been produced by the failure to pay the six per cent. upon the amount of its dividend. It was admitted that the failure to pay the six per cent. was good cause of forfeiture; but the forfeiture had not been judicially declared. No proceeding for that purpose had ever been instituted by the state; on the contrary, by an act of legislation the consequences of a forfeiture were in part waived, and the bank permitted to sue for and collect the debts to it. It is true the act was passed after the cause of forfeiture had arisen. But there had been previous thereto no judicial ascertainment of that cause; of course there had been no judgment of forfeiture pronounced against the bank. Hence the court very properly decided that the suit could be maintained by the bank, as it is settled doctrine that a corporation is not to be deemed in law dissolved by any nonuser or misuser of its franchises, until it has been judicially declared to be so: 2 Kent's Com. 312; *Bank of Niagara v. Johnson*, 8 Wend. 645; *Angell & Ames on Corp.* 129, 667; *Wilde v. Jenkins*, 4 Paige, 481; *Buncombe T. Co. v. McC Carson*, 1 Dev. & B. L. 306. And this rule applies equally to cases where it is expressly declared by the law or the charter that a corporation shall be deemed dissolved upon the commission of the acts which are declared to constitute the cause of forfeiture. Here, then, there was no actual forfeiture, but only an act committed which was a cause of forfeiture, and which the state alone had a right to enforce. Hence there was no survivor of the obligation of contracts after

a dissolution. It is manifest, if this case can be regarded as deciding any principle, except that the state may waive or insist upon the consequences of a forfeiture of a charter, it must be held to decide, not that the obligation of the contracts of a defunct banking corporation survives its extinguishment, but after a bank "charter has been forfeited and dissolved," and become "unlawful, and every note taken by such bank null and void," it is competent for the state, by an act of the legislature, to restore the corporation, and give validity to contracts which are void *ab initio*. We presume that no such doctrine will be contended for at this day.

2. Considering it conclusively settled, that without legislative interposition upon the dissolution of a banking corporation, the debts to and by it are extinguished, we will proceed to inquire to what extent and for what purposes the rules of the common law in regard to that subject have been modified by the statute law of the state.

The principal act on this subject is the statute passed on the twentieth of July, 1843, prescribing the mode of proceeding against incorporated banks for a violation of their corporate franchises: Hutch. Dig. 329. By the eighth section of this statute it is provided that "upon judgment of forfeiture against any bank or banks, corporation or corporations, person or persons pretending to exercise corporate powers in this state, as contemplated by this act, the debtors of such bank or banks, corporation or corporations, person or persons pretending to exercise corporate privileges, shall not be released by such judgment from their debts and liabilities to the same; but it shall be the duty of the court rendering such judgment to appoint one or more trustees to take charge of the books and assets of the same, to sue for and collect all debts due such bank or banks, corporation or corporations, person or persons pretending to exercise corporate powers, and to sell and dispose of all property owned by such bank or banks, corporation or corporations, person or persons pretending to exercise corporate powers, or held by others for its or their use; and the proceeds of the debts when collected, and of the property when sold, to apply as may hereafter be directed by law to the payment of the debts of such bank or banks, corporation or corporations, person or persons pretending to exercise corporate powers; provided, further, that the notes of any such bank or banks, corporation or corporations, or others pretending to exercise corporate powers, shall at all times be received in payment of debts due the same."

The principal alterations, it will be perceived, introduced by this statute, are, that by a judgment of forfeiture pronounced against a banking corporation, its debtors are not released from their debts. That a trustee shall be appointed with power to sue for and collect the debts due to the dissolved bank, and to sell and dispose of all other property belonging to it, and that the debts, when collected, and the proceeds of the sales of the property shall be applied by the trustee to the payment of its debts, in the mode which might thereafter be directed by law.

It is manifest that it was the chief object of the legislature, by these alterations of the law in regard to corporations, as it then existed, to secure the entire assets of a dissolved banking corporation as a fund out of which the claims of its creditors might be satisfied.

"The act, in effect," said this court in the case of *Nevitt v. Port Gibson Bank*, 6 Smed. & M. 513, "declares the assets of the bank to be a trust fund for the payment of the debts, and makes it the duty of trustees to collect them. This is a trust which would be enforced in a court of equity without any further legislation. Indeed, if the legislature were to attempt to apply the assets to any other purpose than the payment of the debts of the corporation, it would transcend its constitutional limits." This view of the subject was again held in the case of the *Commercial Bank of Natchez v. Chambers*, 8 Id. 49. These decisions very clearly indicate the opinion of this court as to the character of the interest which vests in the creditors of a banking corporation, upon its dissolution by judgment of forfeiture, and the nature and extent of the duties and the powers which devolve upon and vest in the trustee. The assets of the bank are regarded as a trust fund, irrevocably dedicated to the payment of the debts due by the bank at the time of its dissolution. The trustee to be appointed is regarded not as a mere agent whose authority may be revoked by the legislature; but as holding a position not unlike that of a trustee appointed by contract.

"There is a trust fund," says the court, "a use to which it is to be applied, and a trustee to apply it." Hence the defendant in error came into possession of the assets of the bank, which are declared to be a trust fund for the payment of its creditors, and whether he should be regarded as assuming a relation strictly analogous to that of a trustee appointed by contract, or looked upon in a twofold capacity as an officer of the court in which the judgment of forfeiture was rendered, appointed to execute that judgment, and as an official trustee, charged by law with

the performance of certain duties, and clothed with the authority requisite for that purpose, in either event, neither could his power nor the rights of the creditors be divested by an act of the legislature passed subsequent to the judgment of forfeiture. We may, therefore, pass the act of 1846 amending the statute above referred to, and proceed to an examination of the question whether the stockholders, as such, would be entitled to the surplus, if any should remain after the payment of the claims of the creditors.

We have shown that the obligation of the contracts entered into by and with a corporation did not survive its dissolution, according to the principles of the common law; but that the demands of creditors and the rights of all parties having an interest in the corporate funds were thereby extinguished.

If, therefore, the stockholders have a remaining interest which would attach to the surplus, if any exist, it must be by virtue of the act of 1843. The right of the stockholders to the surplus is put upon three grounds: 1. It is insisted that upon a liberal and equitable construction of the statute, they are entitled to it as creditors; 2. That as the whole of the assets were saved from extinction, and vested in the trustee, they exist now in his hands, subject to all demands which existed anterior to the judgment; and, 3. That the obligation of the contracts does not cease upon the dissolution of a corporation; although they can not be enforced, for the reason that there is no person on whom the legal title is cast. Hence it is inferred that when the trustee is appointed, who takes a legal title, a remedy is supplied, and the rights of all parties may be enforced.

This last position is based exclusively upon the idea that, independent of any legislation, the rights of the stockholders would have survived the dissolution of the bank. What we have above said on this subject is sufficient answer thereto, and we will pass to the consideration of the question whether the stockholders, as such, under the provisions of the statute, stand in relation of creditors of the bank.

If a stockholder, as such, is a creditor, it results, necessarily, that his stock is a debt due by the bank. A very slight examination will show that such a position is absurd and untrue.

A corporation is an artificial person created by law; and in the case of a banking corporation, is composed of the individuals who have become the owners of the stock, each of whom is thereby constituted a corporator, identified with and forming a constituent part of the corporate body. The stockholders, as

such, can not be distinguished from the corporation. Hence, where the stockholders and the incorporated company of which they are components are spoken of, reference is invariably had to one and the same collection of persons: *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 87.

How then can the bank be the debtor of a stockholder, as such, on account of the stock which he owns in it? Or how can a stockholder, because he is the joint owner of the corporate fund, be a creditor of the bank, if the stock of a bank is a joint or common fund, owned by the stockholders in their corporate character, who, as such, in the estimation of the law, constitute but one person. A debt is a duty or obligation which one person owes to another. The idea of a debt, in the legal sense, necessarily implies the existence of two distinct persons or bodies—a debtor and a creditor. Hence it can not be said with greater propriety that the stockholders of a corporation, because they are stockholders, are its creditors, than that the members of a partnership are creditors of the firm because they are the owners of the partnership stock.

The distinction between creditors and stockholders is recognized without exception in all the books. In *Angell & Ames on Corporations*, it is laid down that the stockholders of an incorporated company are not the creditors of the company. In the case of *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84, which contains a very distinct explanation of the relation existing between a corporation and its stockholders, it is expressly stated that the latter are not the creditors of the corporation.

It is now the prevailing opinion, that the capital stock of banks is a pledge or trust fund for the payment of debts contracted by the bank. Beyond a doubt, it is a fund which can not rightfully be withdrawn or diverted from that purpose. In *Wood v. Dummer*, 3 Mason, 307, which was read as an authority to show that the stockholders were creditors of the bank, this view is distinctly taken. "During the existence of the corporation," says Justice Story, "it [the capital stock] is the property of the corporation, and can only be applied according to its charter; that is, as a fund for the payment of its debts, upon the security of which it may discount and circulate notes." As the capital stock is pledged for the payment of debts contracted by the banks, upon a winding up of its concerns the creditors have a prior exclusive right to be paid out of its effects, as contradistinguished from the stockholders. And upon that ground the court in this case decided that dividends received by

the stockholders upon the amount of their stock might be followed into their hands and applied to the payment of the debts. This is perfectly inconsistent with the idea that the stockholder as such is a creditor, or that the stock owned by him is a credit in his favor and against the bank. Indeed, upon the principles of common sense, as well as upon authority, it would seem to admit of no doubt that the stockholders, as such, are not the creditors of a bank.

But it is insisted that we should so construe the statute as to embrace within its provisions the rights of the stockholders, as well as the claims of the creditors, as such a construction would be promotive of a liberal, wise, and just policy. It is sufficient to say that considerations of such a character are entitled to weight in the construction of statutes only in cases of doubtful interpretation, and where the meaning and intention of the legislature appear to be opposed to the literal import of the language of the act.

A just as well as an enlightened policy might have dictated the propriety of shielding the stockholders as well as the creditors from the common-law effects of a judgment of forfeiture. But such has not been the policy of our law. Until the act of 1843 was passed, as we have seen, creditors and stockholders were equally affected by the dissolution of the corporation. That act in terms applies to the creditors only, and in cases where the dissolution has been produced by a judgment of forfeiture, leaving the effects of a dissolution, accruing either by a surrender or by the efflux of time, to the unmodified control of the common law.

In most, if not all of the states, except the state of Mississippi, in which the legislature has deemed it expedient to repeal or modify the principles of the common law which apply on the dissolution of a banking corporation produced by a judgment of forfeiture, express provision has been made by which the stockholders may take the surplus after the payment of debts. In this state a different course has been pursued. The claims of the creditors are expressly protected, but not a word is said in regard to the interests of the stockholders. This circumstance is strongly indicative of the intention of the legislature. It leaves little ground to doubt that it was the intention of the legislature to leave them to their fate, under the law as it had previously existed.

If the stockholders were not personally irresponsible for the debts of the bank, it would nevertheless be exceedingly unjust

to permit them to share the assets of a defunct and insolvent corporation on equal terms with those who are, in a strict legal sense of the term, the creditors. But such a result would inevitably follow, if the stockholders, under the act, were held to occupy that relation. It can not be doubted that this would be the case, as the saving in the statute is for the creditors generally, without distinction or classification. They would all stand on the same platform.

Upon the whole, we do not think that it was the intention of the legislature to keep the debts alive for the benefit of the stockholders.

We now proceed to the consideration of the next assumption upon which it is maintained that the rights of the stockholders survived the dissolution of the corporation, and attach to the surplus in the hands of the trustee. We have above endeavored to show that the obligation of the contracts does not survive; in other words, that the rights and liabilities of all parties, creditors, debtors, and stockholders, become totally extinguished upon the civil death of a corporation. We have also seen that the contracts of the debtors and creditors by the act of 1843 were preserved from extinction, and that the entire assets of the bank constituted a trust fund, dedicated to the payment of the debts. We have also seen that the contracts of the debtors and creditors by the act of 1843 are preserved from extinction, and that the entire assets of the bank were established as a trust fund dedicated to the payment of the debts. We have likewise endeavored to prove that under the operation of the statute any right in the stockholders to the surplus did not survive, either by an express provision for that purpose, or as embraced under the head of claims of creditors.

We have next to ascertain whether the rights of the stockholders, independent of any legislation for that purpose, attached to the fund as necessarily incident upon the preservation of the assets and the appointment of a trustee.

It is obvious that this position and the argument in support of it proceed upon the supposition that there was a right in the stockholders unaffected by the judgment of forfeiture. If so, it undoubtedly attached. The true question then is, Did the right survive under the operation of the act of 1843?

It will not be contended that the legislature had not the power to repeal, in whole or in part, the consequences of a judicial forfeiture. One of these consequences, as we have seen, was at common law the total extinguishment of the interest of the stock-

holders in the corporate property. The question then is, Has the statute remitted that consequence, or repealed that principle of the common law by which it was produced? If it has not, by express enactment or necessary implication, then we must regard it as still in force. We have above remarked that there is no express provision which saved the rights of the stockholders, nor anything by which we could infer that such was the clear intention of the legislature, though not embraced in the language of the statute.

In coming to this conclusion, we have followed, as we believe, the previous and deliberate adjudications of this court. In the case of the *Commercial Bank of Natchez v. Chambers*, referring to the case of *Nevitt v. Port Gibson Bank, supra*, the late chief justice of this court said: "We also decided that the act, in effect, declared the assets to be a trust fund for the payment of debts which would be enforced in a court of equity, without any further legislation; and that, if the legislature were to attempt to apply them to any other purpose than the payment of the debts of the corporation, it would transcend its constitutional limits. We still adhere to this construction of the act." Again, in the same case: "When a trustee is once appointed he is amenable to the judicial authority only. A court of chancery may remove him for an abuse of the trust, or compel him to perform it. The title of the creditors is equally clear. It resulted, as a necessary consequence, from the declaration that the debts due the bank should not be extinguished, and that a trustee should be appointed to receive them. It was recognized and strengthened by the declaration that the trustee should apply the proceeds to the payment of the debts of the bank. Although the act does not, in so many words, say that the debts due from the banks shall not be extinguished, yet this is the necessary consequence of what is said. The debts due the bank could have been kept alive for no other purpose; and besides, the declaration that the funds should be applied to the payment of debts necessarily kept the claims of creditors in existence to receive the fund. So it is, too, with regard to the property; the intention was to save all for the creditors, as the property was to be converted into money."

It has been urged, that neither in the case against Chambers nor in *Nevitt v. Port Gibson Bank, supra*, was there a direct adjudication upon the right of stockholders to the surplus. This is true. There was no express reference made to that subject in either case; and it is difficult to account for the silence of the

court, except upon the supposition that no such right was believed to exist; for, undoubtedly, the subject was brought to the mind of the court in both cases; particularly in the Chambers case, in which the principal question was whether, under the act of 1843, and by the judgment of forfeiture against the Commercial Bank of Natchez, rights had not vested which it was incompetent for the legislature to divest. In that case the broad ground was taken by the counsel, that the common-law effect of a forfeiture did not apply to trading or banking corporations, which should be regarded in the light of commercial partnerships. Hence, that the principles which would govern the contracts and rights of parties interested in the property of a partnership would apply upon the dissolution of a banking corporation. This position received the particular notice of the court. The question was, What were the rights, and in whom were they vested, by the judgment, under the law? In examining the point as to the parties in whom rights were vested, if any were indeed vested in the stockholders, it is difficult to imagine how such fact escaped the attention of the court. And if it did not, it is more difficult to conceive why it was not noticed; for, as a matter of principle, it was quite as important that rights were vested in the stockholders as in the creditors. We can not, therefore, doubt that where the court held that there could have been no other purpose in keeping the debts alive than for the payment of the debts of the bank; that the assets of the bank were, in effect, constituted a trust fund for that purpose, and that an attempt by the legislature to apply them to any other purpose than the payment of the debts would be a transcending of their constitutional authority—they intended, with a full view of the subject, to decide that the creditors were the only parties whose rights were saved by the operation of the act. At all events, in yielding our assent to what we believe to be the previous deliberate judgment of this court, we do so, not only on the principle which invests the solemn adjudications of this court with a commanding authority, but from a conviction, after a patient examination, of its correctness.

Much was said on the argument with regard to the impolicy and injustice of the rule at common law which regulates the effect of a judgment of forfeiture. It is probably true that this ancient rule is unsuited to the present altered condition of things, and in utter hostility to the more enlightened spirit of the age. Hence, that it should give way to rules better suited to the emergent interests of society, and consequently more in

accordance with the principles of an enlightened jurisprudence. But the subject has been before the legislature, who have decided it expedient to modify the rule in regard to the creditors and debtors of a bank; but have left the stockholders to their fate at common law. We are called upon neither to approve nor to condemn their course. Our business and our duty here are to give to the laws which we are required to administer their just construction, and to apply them accordingly. We are always satisfied whenever we can effect this purpose, and cheerfully concede to another branch of the government the exclusive right to decide upon their policy or impolicy.

Having seen what were the consequences which followed at common law upon the dissolution of a corporation, and having ascertained how far they have been modified or repealed, we proceed to the consideration of the question which constitutes the first branch of our inquiry, to wit, whether the payment of the debts, or the realization from the assets of the bank of sufficient funds for that purpose by the trustee, was a full and complete execution of his trust, whereby he became *functus officio*.

The whole of the assets of the bank, consisting of credits or debts due to it, chattels and real estate, upon the rendition of the judgment of forfeiture, became a trust fund for the sole purpose of paying the debts due by the bank at the time of its dissolution. The debts were to be collected, and the property of all descriptions was to be sold and applied to that purpose. The defendant in error, under the appellation of "trustee," was appointed under the act to perform these duties, or to execute the trust thus created in favor of the creditors. His character and duties have been assimilated to those of a trustee appointed by contract; but it is not important to determine whether he should be regarded in that light, or rather as an officer of the court for certain purposes, and as a special statutory trustee appointed by the court, whose authority and duties are distinctly defined in the statute. Nor is it very material to determine whether, in a strictly technical sense, the legal title to the property of the bank, real and personal, vested in the trustee on his appointment, or whether the interest and title which did in fact vest, more resembled that of a sheriff in reference to chattels and lands, arising by reason of a levy of an execution, or of a receiver appointed to take charge of and administer a particular fund for specific purposes; as it is not contended that whatever was the character of the estate acquired

by the trustee in the assets, his authority was not amply sufficient to a full execution of the trust; and as it is not perceived that a different rule would be applicable in either case, in order to test the continuance of his authority.

At this point, then, the inquiry is, Can the trustee, thus constituted, having paid off and discharged the whole of the debts of the bank, sue for and recover the debts which were due to it, and which are still outstanding and unpaid? We answer, that he can not; that his power to sue was terminated by the execution of his trust, which was fully performed when the demand of the last creditor was paid. This conclusion seems to follow from the very powers and character of the trustee. The assets of the bank, by the judgment of forfeiture, become a trust fund, constituted for the sole purpose of paying the debts of the bank. The trustee was appointed to execute the trust. In regard to the trust property, he took either a naked power or the legal estate without any beneficial interest whatever. When the debts were all paid, there was no remaining purpose or object for which his authority could be exercised. The trust having been fully performed, the objects for which his powers were conferred having been accomplished, it would seem, upon the plain principles of common sense, that his authority should also be at an end.

Again, by the dissolution of the bank, all remedy by action against it was lost; but the statute, by providing a trustee who should take charge of its effects and hold them in trust for the benefit of the creditors, furnished a means by which the creditors to the extent of the assets, might obtain satisfaction of their demands. In effect, by the appointment of the trustee with his duties and powers, a remedy was supplied to the creditors by which their claims might be enforced against the debtors and property of the defunct bank. Hence, when their last demand was paid off and discharged, the remaining debtors were released, not by reason of the judgment of forfeiture, for that effect was prevented by the statute; but because there was no person who had a right to demand payment. The creditors could not require the application of the remedy, for they had no rights to enforce. Nor could the trustee rightfully sue for the remaining debts, because he had no beneficial interest; and because it would be in the last degree absurd to permit him to employ his naked legal title for the collection of money to which neither himself, his *cestui que trust*, nor anybody else would be entitled: *Fox v. Horah*, 1 Ired. Eq. 358 [36 Am. Dec. 48].

It is also clear, upon the authority of cases decided, that the right of the trustee at law and in equity to sue for and collect the claims outstanding when the debts were paid, ceased to exist.

It is a general rule in all cases where it is doubtful what estate the trustees have in them, that the trustee is presumed to take an estate large enough to enable him to accomplish the purposes of the trust. Hence, where the estate arises by implication alone, a fee will be implied when there are trusts to be performed which require the trustee to be invested with an estate in fee in order to enable him to effectuate them: *Trent v. Hanning*, 7 East, 97; *Oates ex dem. Markham v. Cooke*, 3 Burr. 1684. This is the general rule as to the character or extent of the estate, where, by the terms employed, it is left uncertain what estate had vested.

But on the other hand, the trustee will never, by construction, be held to take a greater estate than the nature of the trust demands: *Doe ex dem. White v. Simpeon*, 5 East, 162; *Doe ex dem. Woodcock v. Barthrop*, 5 Taunt. 383. And even when a greater estate than is necessary for performance of their trust is devised to trustees, and there are uses limited upon that trust which may be executed by the statute, they will be construed to be executed in remainder, a particular estate only abiding in the trustees. This rule is recognized in the case above cited from East, where it is said by Lord Ellenborough that when the purposes of a trust can be answered by a less estate than a fee simple, a greater estate than is sufficient to answer such purposes shall not be permitted to pass to the trustee; but that the uses in remainder, limited on such lesser estate so given to them, shall be executed by the statute: *Doe ex dem. Compere v. Hicks*, 7 T. R. 433; *Curtis v. Price*, 12 Ves. 89.

Apply the doctrine recognized in these cases to the question under examination, and it will be clearly seen that the trustee, in regard to the real estate, was not vested with the fee.

The language of the statute is, "that he shall sell the property owned by such bank." The trustee could, at most, take only a power to sell and dispose of the real property, because such power would be fully sufficient to enable him to carry into effect the purposes of the trust. His power of sale is strictly analogous to those of a sheriff or commissioner proceeding to sell by virtue of an execution levied upon lands, or in pursuance of a judgment or decree of the court. The trustee was charged with the payment of the debts out of the assets. That

was his trust, and his power of sale was limited by the purpose for which it was granted. Hence, when lands sufficient for the payment of the debts were sold, his further power to sell was necessarily at an end. This principle is fully recognized in the case of *Robinson v. Taylor*, 1 Ves. jun. 44, when Lord Thurlow held that "where property is given for particular purposes in trust, nothing more is subject than those purposes require." This doctrine is again distinctly recognized in *Chitty v. Parker*, 2 Id. 271; *Wright v. Wright*, 16 Id. 188. Indeed, it is too well settled to require the citation of authority. There is no greater reason for holding that the power of sale would continue in the trustee, after a sufficient amount to pay the debts had been realized, than there would be for continuing in the sheriff a right to sell under an execution in his hands, after the judgment was satisfied.

In regard to the choses of the bank, this court has decided that the legal title vested in the trustee. The grant of power in the statute was "to sue for and collect all debts due the bank." This was held by implication to transfer the legal title, which was in the bank, and to vest it in the trustee.

We have above seen that a trustee will never be construed to take a greater estate than is required for the purposes of the trust. Hence, the power over the choses of the bank, or the legal title thereto which vested in the trustee, will not be held to be larger or of greater extent than is necessary to enable him fully to carry into effect the purposes of the trust. That trust was the payment of the debts of the bank. When they have been paid, there is no longer a reason why the implied legal estate of the trustee should be held to exist. Like the power to sell and dispose of the real estate, the right of the trustee to sue for and collect the debts, as it would appear, should terminate upon the payment of the debts of the bank.

If there was a resulting trust in favor of the stockholders, the case would be different. But we have seen that their right to the surplus did not survive the forfeiture. There can be no trust without a *cestui que trust* entitled to take it. Hence there could not be a resulting trust in favor of the stockholder, for the obvious reason that they have no equities attaching to the surplus.

If, as we have decided, the assets of the bank are a trust fund exclusively for the benefit of the creditors, and that the stockholders have no claim upon it as creditors, for what purpose, it may be asked, should the power of the trustee to sue for and

collect the outstanding debts be held still to exist? The power could be exercised for no rational purpose, as there would be no one entitled to the fund when reduced into possession by the trustee. And for this reason alone, it is clear that a court of chancery would not compel the trustee to bring suit for the purpose of collecting these debts.

This shows conclusively that in equity the authority of the trustee to sue for and collect the remaining debts would be considered at an end. The case of *Fox v. Horah*, above cited, is a decision in point. In this case, where a note was made payable to the cashier of the State bank, as trustee, for the use and benefit of the bank, by whom it was discounted, and the bank charter afterwards expired by its own limitation, before it could be collected, it was held, after judgment was obtained on the note by the cashier, that as the bank in equity had the sole right to the money secured by the note, and as that right had become extinct by the dissolution of the corporation, that the maker of the note was entitled to a perpetual injunction to restrain the collection of the note.

In delivering the opinion of the court in that case, Judge Gaston said: "The bank was in truth the creditor; the note and the judgment were but securities belonging to the bank, and proper to be enforced to compel payment to the bank of what was due to it. No one could rightfully put these securities in use, but by the expressed or presumed direction of the bank. Upon the death of the bank, without succession or representative, this debt became, by law, as completely extinguished as it could have been by a release from the corporation. While there was a debt and a creditor, the trustee could not rightfully enforce the securities but for the payment of the debt to the creditor. After the extinguishment of the debt, he can not rightfully enforce the securities, because there is no debt to be paid, and no creditor to be satisfied."

It is clear, then, in equity, that the right or title of the trustee to sue after the execution of his trust would be considered at an end.

At law, it is the settled rule that a trust estate, given for specific purposes, should continue for so long a period only as is necessary to effect the purposes of trust. In the case of *Doe ex dem. Player v. Nicholls*, 2 Dow. & Ry. 480, it was said by Holroyd, J., "that the rule of law clearly established by several of the late cases shows that the estate of trustees, even where there are words of inheritance used, shall continue in the

trustee no longer than necessary for the performance of the trust." The same rule is recognized in *Doe v. Barthrop*, 5 Taunt. 382, and in *Doe v. Simpson*, 5 East, 162.

In the case of *Brown v. Weast*, 7 How. (Miss.) 181, it was decided by this court, that where one purchased land with the money of another, and has a conveyance made to himself, or has been paid the purchase money of land, and has not conveyed, he is a trustee of a satisfied trust, and neither he nor his heir can recover upon his legal title against the beneficiary.

According to the rule of law recognized in these cases, it may clearly be inferred that the estate of the trustee in the assets ceased upon the execution of his trust. This power or authority over the choses of the bank, or in other words, his title to sue for and collect them, could not continue longer than was required by the purposes of the trust.

In modern times the courts have been induced to limit the duration of estates vested in trustees by the desire to prevent actions from being defeated by technical objections of outstanding legal estates: *Jones v. Cole*, 2 Bayley, 330; *Liptrot v. Holmes*, 1 Ga. 381.

A reason equally strong exists why courts should disown recoveries sought to be obtained upon mere naked legal title in the trustee, where the objects of his trust have been fully accomplished. Why permit the owner of a satisfied trust to recover upon his naked legal title, when, so soon as he has succeeded, he may be compelled to surrender his title as well as his possession? In the case at bar, the reason applies with very great force. Why permit the trustee to recover upon his legal title, when, if the trust has been satisfied, he may be enjoined by the debtors? Again, the trustee holds the property of the bank by legal assignment, which has been construed to vest him with the legal estate, for the purpose of executing the trust. The trust being ended by the payment of the debts, there would be no necessity for transferring the legal title. To whom could the legal title be transferred, if it still existed? But it ceased to exist in any one when the trust was performed. It became extinct in the same manner it was created, by operation of law.

It is said that if the demurrer be overruled, issue will be joined upon the plea in the court below; and it is strongly urged as an objection, that the court will not be competent to try it. We do not perceive the force of the objection. The question which, upon the issue, will be submitted to the jury, is one purely of fact; that is, whether the debts of the bank

have not been paid off and discharged. This is certainly a question which a jury could readily comprehend and satisfactorily decide. The evidence might be complicated, but not necessarily so. We can not doubt the ample jurisdiction of the circuit court to settle the account of the trustee. If that court has not the jurisdiction for that purpose, no other court has. A court of equity might incidentally, in a suit by a creditor of the bank against the trustee, compel the trustee to settle his accounts, but it has no direct supervisory jurisdiction over the subject.

Many of the questions presented by the record in this case are difficult, and of great importance. We have given to them the careful examination which their importance and the magnitude of the sum involved required, and our conclusion is, that the judgment should be reversed, the cause remanded, and the demurrer to the second plea be overruled in the court below.

Another question is presented by the demurrer to the third plea of the defendants, but upon that we pronounce no opinion.

COURTS HAVE NOTHING TO DO WITH WISDOM, SOUND POLICY, OR EXPEDIENCY OF LAW: *Winter v. Jones*, 54 Am. Dec. 379. Courts have no dispensing power over statutes: *Bon v. Stanford*, 51 Id. 142.

DEBTS DUE TO AND FROM CORPORATION WERE EXTINGUISHED ON ITS DISSOLUTION at common law: *Hightower v. Thornton*, 52 Am. Dec. 412, and note.

LEGAL ESTATE CONVEYED IN TRUST MUST BE COMMENSURATE WITH TRUST: *Gould v. Lamb*, 45 Am. Dec. 187.

WEBB v. MILLER.

[24 MISSISSIPPI, 638.]

GARNISHEE MUST BE ALLOWED RIGHTS OF ANY OTHER PARTY in court to make such defense as the law allows him against the party seeking to charge him with a liability.

ON REVERSAL OF JUDGMENT DISCHARGING GARNISHEE, the latter should be allowed to file an amended answer, setting forth the payment of the debt by him to his creditor, after the judgment of discharge, and before the writ of error was sued out.

ON JUDGMENT OF DISCHARGE OF GARNISHEE, if he could make no defense against the claim of his creditor in law or in equity, and his judgment could be enforced by legal process, he can make a voluntary payment of it to the creditor, and he can not resist payment on the ground of a mere possibility that a writ of error might be prosecuted to the judgment discharging him.

ERROR from the Madison county circuit court. The opinion states the case.

A. H. Handy, for the plaintiff in error.

Lawson and C. C. Shackleford, contra.

By Court, FISHER, J. The plaintiff in error was summoned to the May term, 1844, of the circuit court of Madison county to answer as a garnishee, in what sum he was indebted to one Jesse Meek, against whom the defendants in error had recovered a judgment in said court for the sum of two thousand four hundred and sixteen dollars and fifty-eight cents.

The garnishee appeared within the proper time, and answered that he was indebted to said Meek in the sum of one hundred and eighty-nine dollars, and that there was then a suit by Meek pending in said court against him, the garnishee, for that amount. He also prayed, in his answer, to be protected against the consequences of said suit, so that he would be fully protected by one payment of the money.

At the April term, 1847, of the court, upon his motion, the garnishee was discharged; and very soon thereafter made a settlement with Meek, and discharged his indebtedness to him. After this, Miller, the defendant in error, and the judgment creditor of Meek, prosecuted a writ of error to the judgment of the circuit court, discharging the garnishee, which was reversed by this court, and the cause remanded to the circuit court. After the cause was, upon this reversal, reinstated in the circuit court, the answer of the garnishee was traversed, a jury impaneled to try the issue thereon, and verdict rendered for the sum of two thousand five hundred and sixty-three dollars and sixty-two cents, and a judgment of the court accordingly against the garnishee.

The garnishee also moved the court for leave to put in an amended answer, setting forth, among other matters, the payment of the debt to Meek, after the judgment of discharge, and before the writ of error was sued out; which amendment the court refused to allow the party to make.

The question to be considered is, whether the court erred in refusing leave to the garnishee to file his amended answer, or so much thereof as set forth payment to Meek, under the circumstances stated.

A garnishee must be allowed the rights of any other party in court, to make such defense as the law allows him, against the party seeking to charge him with a liability. The judgment of

the court discharging him was not void, but only erroneous. After his discharge he was left without any defense against the judgment of Meek, who could at any time enforce it against the garnishee; and if the judgment could be enforced by legal process, and the garnishee, who was the defendant in the judgment, could make no defense against it at law or in equity, it follows that he could at the same time make a voluntary payment of it to the creditor.

It can not be pretended for a moment, that if Meek had sought to collect his judgment by legal process, before the writ of error was sued out, that the defendant therein, the garnishee in the present proceeding, could have resisted payment on the ground of a mere possibility that a writ of error might be prosecuted to the judgment discharging him.

We are, therefore, of opinion that the court erred in rejecting so much of the amended answer as set up the payment of the judgment to Meek, before the writ of error was prosecuted to the judgment discharging the garnishee.

Judgment reversed, and cause remanded.

RIGHTS OF GARNISHEE, GENERALLY: See *Shinn v. Zimmerman*, 54 Am. Dec. 260; *Farmers' and Mechanics' Bank v. Little*, 42 Id. 293; *Yarborough v. Thompson*, 41 Id. 626; *Cottrell v. Varnum*, 39 Id. 323; *Stone v. Magruder*, 32 Id. 177; *Hanna's Syndics v. Lauring*, 13 Id. 339; *Mathis v. Clark*, 12 Id. 688.

GARNISHEE HAS NO RIGHT TO SETTLE HIS DEBT BECAUSE GARNISHMENT SUIT NOT PROSECUTED to judgment the term in which the writ is made returnable: *Stroup v. Sullivan*, 46 Am. Dec. 389.

JUDGMENT AGAINST GARNISHEES: See the note to *Sessions v. Stevens*, 46 Am. Dec. 339, discussing this subject.

WARREN v. BROWN.

[26 MISSISSIPPI, 66.]

ACKNOWLEDGMENT BY MARRIED WOMAN of deed or instrument should state that the same had been made separate and apart from her husband, and that she was examined privately touching the same.

PURCHASES MADE BY HUSBAND IN WIFE'S NAME during coverture will be treated as advancements made to her separate use, provided they are made in good faith, and with no intention to defraud creditors.

APPEAL from the northern district chancery court at Columbus. The facts are stated in the opinion.

Crusoe and George L. Potter, for the plaintiff.

James T. Harrison, for the defendant.

By Court, YERGER, J. The complainant filed a bill to enjoin the sale of some town lots in the town of Columbus, to which she had a lease of ninety-nine years, renewable forever; and which by deed, jointly with her deceased husband, she conveyed to the defendant Eggleston, in trust, to secure a debt due by her husband to the defendant Brown. The ground of relief chiefly relied upon is, that the deed was executed under threats and duress, and without her voluntary consent. The proof of the threats and duress seems ample, but it is not shown that either Brown or Eggleston was aware that they had been used. It is insisted, that in the absence of such knowledge upon their part, the acknowledgment made by complainant before the magistrate estops her from denying the validity of the deed.

The title of complainant to the premises was derived from trustees of the Franklin Academy, by a lease made to her during coverture, on the fourteenth of August, 1847. But defendants allege that the consideration was paid by the husband, and that complainant can not, therefore, hold the property in her own name; but that the same belonged to the husband, and is subject to his debts.

The acknowledgment made by the complainant is not in accordance with the statute, but is defective in an essential particular. It is true that it states that it was made "separate and apart from the husband;" but it does not purport to have been made on "a private examination."

This is as essential a requisition of the statute as an examination "apart from the husband." For it will be readily seen that the objects of the statute might be as easily defeated, if the examination was not made in private, as if made in the presence of the husband.

This view of the case renders it unnecessary to decide whether a *feme covert* would be estopped by an acknowledgment made in due form from showing threats or duress.

This brings us to the consideration of the second question: Had the complainant a separate estate in the premises by virtue of the lease to her?

As the wife can not be a trustee for the husband, it has long been a principle of courts of equity, that purchases made by him in her name during coverture would be treated as advancements made to her. In this case, it appears from the petition of C. D. Warren, the husband, made on the thirteenth of August, 1847, to the trustees of the Franklin Academy, that Mrs. Warren, his wife, became "the owner, by purchase, from Joseph Bryan,"

of the lots in controversy; and the petition contained a prayer that a deed for them might issue in her name, which was accordingly done. One of the witnesses proves that the husband, at the same time, paid the balance due from Joseph Bryan on the original lease of the lots. It is said the money he thus used was his own, and not Mrs. Warren's. Of this there is no direct proof; but if it be conceded, the case falls within the principle of equity we have just stated, and must be considered as an advance to the wife for her separate use.

But it is said that if the money was advanced by the husband, the wife can not hold the property in her own name, because of the proviso of the first section of the act of 1839: Hutch. Code, 496.

In the case of *Ratcliffe v. Dougherty*, 24 Miss. 181, we stated that the act of 1839 was an enabling, not a restraining, statute, and intended to extend, not to limit, the powers of married women to hold separate property; and we there held, that a deed made directly by the husband to the wife, though void at law, would be sustained in equity against him, though not against his creditors. And the rule there laid down we would apply to this case, had the conveyance been made by the husband to the wife. But here the husband did not make the deed to the wife. The conveyance was made to her by a stranger. The title to the property never was in the husband, and it does not therefore fall within the proviso to the first section of the act of 1839, as the "property," in the words of the proviso, "did not come from him."

But it is said he advanced the money which paid for it. This may be true. Before the act of 1839, a husband could make such purchases in the name of his wife, and they were treated as advances made to her separate use. The power still exists, in our opinion, not impaired by that act; and the only inquiry that can be made under such circumstances is, whether the advance was made *bona fide*. Of course such advances, being merely voluntary, would be set aside, at the instance of creditors, in all cases arising since the act of 1839, in which, under like circumstances, they would have been set aside if the act had not been passed.

The record before us contains no suggestion of fraud, and the debt which the defendants seek to collect was made subsequent to the lease to Mrs. Warren. Under such circumstances, we think a court of equity will protect her right to the property. The decree of the court below must be reversed, and the cause remanded.

EFFECT OF PURCHASE BY AND DEED TO MARRIED WOMAN.—From the principle of the common law which regards the husband and wife as one person, it had been repeatedly held, until enabling statutes had been passed, that the legal existence of the wife was suspended during marriage, and consequently that all the property was vested in the husband. The common law, though regarding marriage as a civil contract, distinguished it from other civil contracts by treating it as the formation and foundation of a connection the parties by their own consent were incapable of dissolving. This connection involving the duty of living together, in the nature of things the power of umpire must be placed in the hands of the one or other of them. This power was committed to the husband; the husband and wife were regarded as one person, and her legal existence and authority, in a degree, lost or suspended, or, as it was sometimes expressed, merged in that of the husband. She had not the capacity to contract, nor had she administration of property. By the marriage, if the wife was seised of an estate of an inheritance, the husband became seised thereof, taking the rents and profits during their joint lives, and by possibility during his life. If the wife had an estate of freehold, not of inheritance, as for her own life or the life of another person, the husband became seised of such estate, and entitled to the rents and profits during marriage. If the estate was *pur autre vie*, the husband, surviving the wife, became a special occupant of the land during the life of such person. Her chattels real passed to the husband, who had power to sell, assign, or make other disposition of them at pleasure. As to her choses in action, he had an unqualified right of reducing them to possession, and thereby acquiring absolute ownership of them. He could sue for and recover, release, discharge, or assign them. Of her personal property in possession *co instanti* the marriage, title and possession passed to the husband. So of personal property, title and possession of which accrued to the wife during marriage. The possession of the wife was the possession of the husband, "because her legal existence was merged in his," and the wife was positively incapable of a possession, in the eye of the law, distinct from that of the husband. So arbitrary was the rule, that the husband could not make any gift to his wife except through the intervention of a trustee. But owing to the progressive spirit which has pervaded the growth of law, the barriers have been gradually removed, and a spirit of equality generally prevails. Upon studying this question, it will be found that at an early day, even at common law, a married woman might purchase real estate without the consent of her husband. One of the earliest writers says that "a *feme covert* can not take anything of the gift of her husband, but is of capacity to purchase of others without the consent of her husband. But her husband may disagree thereunto, and divest the whole estate; but if he neither agree nor disagree, the purchase is good; but after his death, albeit her husband agreed thereunto, yet she may without any cause to be alleged waive the same, and so may her heirs also, if after the decease of her husband she herself agreed not thereunto:" Co. Lit., p. 1, lib. 1, c. 1, sec. 3 a. See also 1 Com. Dig. 566, Baron and Feme, p. 2. And if she may take absolutely, so she may take upon condition: Id. 570, Baron and Feme, p. 8, 10.

The prevailing doctrine in most of the states of the Union is, that a married woman can purchase real estate without the consent of her husband, and that such purchase will be deemed valid: *Shields v. Keys*, 24 Iowa, 299; *Knapp v. Smith*, 27 N. Y. 277; *Darby v. Callaghan*, 16 Id. 71; *Ramsdell v. Fuller*, 28 Cal. 39; *Meyer v. Kinzer*, 12 Id. 252; *Scott v. Maynard*, 1 Dallam, 548; *McIntyre v. Chappell*, 4 Tex. 187; *Love v. Robertson*, 7 Id. 6; *Huston v.*

Curt, 8 Id. 239; *McKay v. Treadwell*, Id. 180; *Edrington v. Mayfield*, 5 Id. 388; *Patterson v. Robinson*, 25 Pa. St. 81; *Ramborger's Adm'rs v. Ingraham*, 38 Id. 147; *Cowdon v. Wickerham*, 54 Id. 302; *Glass v. Warwick*, 40 Id. 140; *Bortz v. Bortz*, 48 Id. 387; *Conrad v. Shermo*, 44 Id. 193; *Goff v. Nuttall*, Id. 81; *Hannis v. Hazlett*, 54 Id. 133; *Levi v. Earl*, 30 Ohio St. 147; *Phillips v. Graves*, 20 Id. 372; *Jenz v. Gugel*, 26 Id. 527; *Ames v. Foster*, 3 Allen, 541; *Chapman v. Foster*, 6 Id. 138; *Stewart v. Jenkins*, 6 Id. 300; *Estatebrook v. Earle*, 97 Mass. 302; *Labaree v. Colby*, 99 Id. 559; *Fiske v. McIntosh*, 101 Id. 66; *Gordon v. Dix*, 106 Id. 305; *Faucett v. Currier*, 109 Id. 79; *Miller v. Blackburn*, 14 Ind. 62; *Totten v. McManus*, 5 Id. 407; *Short v. Battle*, 52 Ala. 456; *Carpenter v. Mitchell*, 50 Ill. 471; *Knaggs v. Mastin*, 9 Kan. 532; *Squier v. Stockton*, 5 La. Ann. 741; *Brown v. Lunt*, 37 Me. 423. In some states lands may be conveyed to a wife free from the control of her husband for her sole and separate use. When this can not be effected directly, it may be by means of a trustee: *Commonwealth v. Williams*, 7 Gray, 337; *Ayer v. Ayer*, 16 Pick. 331; *Nightingale v. Hidden*, 7 R. I. 128; *Fisk v. Stubbs*, 30 Ala. 335; *Bayer v. Cockerill*, 3 Kan. 282; *Pooley v. Webb*, 3 Coldw. 599; *Vance v. Nogle*, 70 Pa. St. 176; *Richmond v. Tibbles*, 28 Iowa, 474; *Uhrig v. Horniman*, 8 Bush, 172; *Whitehead v. Arline*, 43 Ga. 221; *Prout v. Roby*, 15 Wall. 471; *Lippincott v. Mitchell*, 94 U. S. 767; *Burnley v. Thomas*, 63 Mo. 390; *McVey v. Green Bay R. R. Co.*, 42 Wis. 532.

EFFECT OF DEED TO MARRIED WOMAN, WHEN SHE IS NOT DESCRIBED AS SUCH.—A deed to a married woman not describing her as such, nor purporting to be for her sole and separate use, is *prima facie* a conveyance to the husband and wife in common, in those states where the law of community prevails: *Adams v. Knowlton*, 22 Cal. 283; while at the common law, a life estate vests in the husband and the reversion in the wife: *Whitehead v. Arline*, 43 Ga. 221; *Merrill v. Bullock*, 105 Mass. 486; *Reeves v. Webster*, 71 Ill. 307; *Devechaud v. Berrey*, 48 Ala. 591; *Hoyt v. Parks*, 39 Conn. 357. Upon proof of a conveyance of land to the wife from a stranger, without any evidence as to the person by whom the consideration was paid, it must be held that it is her separate estate: *Lyon v. Green Bay R. R. Co.*, 42 Wis. 548.

EFFECT OF DEED FROM HUSBAND TO WIFE.—Under the rule of the common law, as distinguished from equity, the husband or wife can not convey land directly one to the other: *Underhill v. Morgan*, 33 Conn. 107; *Martin v. Martin*, 1 Greenl. 394; *Voorhees v. Presbyterian Church*, 17 Barb. 103; *Rowe v. Hamilton*, 3 Greenl. 63. But courts of equity will give effect to such deeds, if not in fraud of creditors, when made through the intervention of a trustee: *Spencer v. Godwin*, 30 Ala. 355; *Jewell v. Porter*, 31 N. H. 34; *Abbott v. Hurd*, 7 Blackf. 510; *Frissel v. Rozier*, 19 Mo. 448; *Fowler v. Trebein*, 16 Ohio St. 493; *Simmons v. Thomas*, 43 Miss. 31; *Barnum v. Farthing*, 40 How. Pr. 25; *Aultman v. Obermeyer*, 6 Neb. 260; *Loomis v. Brush*, 36 Mich. 40; *Bancroft v. Curtis*, 108 Mass. 47; or by means of the statute of uses, in the form of a conveyance to the use of husband and wife: *Pennsylvania Salt Co. v. Neel*, 54 Pa. St. 9; *Roper on H. & W.* 59; or a covenant to stand seised: *Thatcher v. Omans*, 3 Pick. 521. In some states a husband can convey land directly to his wife without the necessity of a trustee: Civ. C. Cal., sec. 158; *Burdeno v. Amperoe*, 14 Mich. 91; *Hoffman v. Stiger*, 28 Iowa, 308; *Wilder v. Brooks*, 10 Mich. 50; *Johnson v. Stillings*, 35 Me. 427; *Allen v. Hooper*, 50 Id. 372; *Winans v. Peebles*, 31 Barb. 371; and it will be sustained in equity, if founded on a meritorious consideration: *Hunt v. Johnson*, 62 Ill. 22; *Dale v. Lincoln*, 44 N. Y. 27; *Watson v.*

Riskamire, 45 Iowa, 281; and distinctly intended for her separate use: *Sims v. Ricketts*, 35 Ind. 181; *Thompson v. Mills*, 39 Id. 520; and if not in fraud of creditors: *Brookbank v. Kennard*, 41 Id. 339; *Annia v. Annia*, 24 N. J. Eq. 185; *Sherman v. Hogland*, 54 Ind. 578.

MISCELLANEOUS.—In *Sims v. Ricketts*, 35 Ind. 181, Buskirk, J., in passing upon the question of the validity of conveyances from husband to wife, laid down the following principles: "Third, That a direct conveyance from a husband to his wife will be sustained and upheld in equity: 1. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit or that of their family, or which has been appropriated by him to his uses; 2. Where the husband is in a situation to make a gift to his wife, and distinctly separates the property given from the mass of his property, and sets it apart to the separate, sole, and exclusive use of his wife. Fourth, Where a wife advances money to her husband, or the husband is indebted to the wife upon any valid consideration, the wife stands as the creditor of the husband; and if the conveyance is made to pay or secure such liability, the wife will hold the property free from the claims of other creditors, when the transaction is unaffected by unfairness or fraud. Fifth, Whenever a contract would be good at law when made with trustees for the wife, that contract will be sustained in equity when made with each other without the intervention of trustees. Eighth, That where conveyances from a husband to his wife have not been sustained in equity, it has been on account of some feature in them impeaching their fairness and certainty, as that they were not in the nature of a provision for the wife, or where they interfered with the rights of creditors, or where the property granted had not been distinctly separated from the mass of the husband's property. Ninth, That in consequence of the absolute power which a man possesses over his own property, he may make any disposition of it which does not interfere with the existing rights of others. Tenth, When a husband is free from debt and has no children, and conveys property to his wife for a nominal consideration, the law will presume that it was intended as a provision for his wife. Eleventh, That a conveyance from a husband to his wife, which is good in equity, vests the title to the property conveyed in the wife as fully, completely, and absolutely as though the deed had been made by a stranger upon a valid consideration moving from the wife." See *Lucas v. Lucas*, 1 Atk. 270; *Freemanle v. Bankes*, 5 Ves. 79; *Battersbee v. Farrington*, 1 Swans. 106; *Latourette v. Williams*, 1 Barb. 9; *Neufville v. Thomson*, 3 Edw. Ch. 92; *McKenna v. Phillips*, 6 Whart. 571; *Kee v. Vasser*, 2 Ired. Eq. 553; *Stanwood v. Stanwood*, 17 Mass. 57; *Phelps v. Phelps*, 20 Pick. 558; *Adams v. Brackett*, 5 Met. 280; *Jones v. Obenchain*, 10 Gratt. 259; *Walter v. Hodge*, 2 Swans. 97; *More v. Freeman*, Bunn. 205; *Lady Arundell v. Phipps*, 10 Ves. 139; *Shepard v. Shepard*, 7 Johns. Ch. 57; *Wood v. Warden*, 20 Ohio, 518; *Gaines v. Poor*, 3 Metc. (Ky.) 503; *Ward v. Crotty*, 4 Id. 59; *Fitch v. Ayer*, 2 Conn. 143; *Cornwall v. Hoyt*, 7 Id. 420; *Morgan v. The Thames Bank*, 14 Id. 99; *Winton v. Barnum*, 19 Id. 171; *Hadley v. Burgess*, 22 Id. 284; and the following cases in this series, and notes: *Harmon v. James*, 45 Am. Dec. 296; *Boozer, Adm'r, v. Addison*, 46 Id. 43; *Litton v. Baldwin*, 47 Id. 605; *Merritt v. Scott*, 50 Id. 365; *Howard v. North*, 51 Id. 769; *Fisk v. Cushman*, 52 Id. 761; *Harris v. Harris*, 53 Id. 393; *Spofford v. True*, 54 Id. 621.

ACKNOWLEDGMENTS IN DEED, NECESSITY AND CHARACTER OF: See *Hunter v. Bryan*, 5 Am. Dec. 526; *McIntire v. Ward*, 6 Id. 417; *Cassell v. Coode*,

11 Id. 610; *Jourdan v. Jourdan*, Id. 724; *Murphy v. Murphy*, 12 Id. 479; *Barnet v. Barnet*, 16 Id. 516; *Tate v. Stoltzfoos*, Id. 546; *Burnett v. Shackleford*, 22 Id. 100; *Fisk v. Cushman*, 52 Id. 761, and notes collecting other cases in this series.

WALLACE v. WORTHAM.

[25 Mississippi, 119.]

WHERE LIABILITY OF PERSON FOR WHOSE USE GOODS FURNISHED EXISTS, any promise by a third person to pay for the same must be in writing; but where this liability does not exist, the promise to pay need not be in writing.

PARTY TO WHOM CREDIT IS ORIGINALLY GIVEN by the vendor is liable for the payment to him of the amount credited.

APPEAL from the circuit court of Choctaw county. The facts are stated in the opinion.

John B. Hemphill, for the plaintiff.

J. I. Guion, for the defendant.

By Court, YERGER, J. This record presents but a single question: Was the promise proved to have been made by the defendant within the first section of the statute of frauds, or a "promise to answer for the debt, default, or miscarriage of another"? The proof is, that the "defendant, before the sale of the articles, requested the plaintiff to sell them to one Newell, and that the sale was induced alone by the promise of the said defendant to pay for them." This was all the evidence in the case, as it appears from the bill of exceptions. It does not appear from anything before us that any credit whatever was given to Newell, or that Newell was liable for the goods.

In *Matson v. Wharam*, 2 T. R. 80, Buller, J., observed that "the general rule is, if the person for whose use the goods are furnished be liable, any other promise by a third person to pay that debt must be in writing." The converse of this proposition is also true. If the person for whose use the goods are furnished is not liable, then the promise to pay need not be in writing. It appears in this case that the goods were furnished at the request of the defendant, and that "the sale was induced alone by her promise to pay for them." As we remarked before, the bill of exceptions, which purports to contain all the evidence, does not show that any credit whatever was given to Newell, or that he was bound for the goods. However true, therefore, as an abstract rule of law, the instruction given by the

court may be, to wit, "if the goods were charged jointly to the defendant and Newell, the promise, to be binding on the defendant, must be in writing;" yet, as there seems to have been no evidence on which to base the charge, and it may have had a tendency to mislead the jury, it was erroneous in the court to give it. From the facts stated in the bill of exceptions, without anything explaining them, the credit seems to have been given entirely to the defendant, and her promise to have been entirely original, and not an understanding to "answer for the debt, default, or miscarriage of another."

Let the judgment be reversed, and the cause remanded.

PROMISE TO PAY DEBT OF ANOTHER, WHEN NOT WITHIN STATUTE OF FRAUDS.—A promise to pay the debt of another, when the liability of the original debtor is discharged, will be treated as an independent contract, and need not be proved to be in writing: *Anderson v. Davis*, 31 Am. Dec. 614; *Cooper v. Chambers*, 25 Id. 710; *Rogers v. Collier*, 23 Id. 153. Where the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself, a promise to pay need not be in writing: *Nelson v. Boynton*, 37 Id. 148. A promise made for the benefit of another need not necessarily be in writing: *Proprietors Upper Locks v. Abbott*, 40 Id. 184. So an agreement to pay toll on certain lumber of a third party, if the plaintiff would allow the same to pass through his canal-locks, partakes of the character of an original undertaking, and need not be in writing: *Id.* When the defendant and another person were in the plaintiffs' store, and the defendant told the plaintiff that he would pay for any goods sold to such other person, and goods were afterwards so sold and charged to both such persons, the defendant was relieved from liability, his promise not being in writing: *Matthews v. Milton*, 28 Id. 247. But where the promise by the defendant to pay is original at the time of the sale, he will be held liable: *Rhodes v. Lee*, 24 Id. 744. So where one who calls in a physician to attend a female who was brought up in his house, but whose time was her own on arriving at age, is originally liable to pay for the attendance, especially where other circumstances combine to show that the defendant expected to pay: *Clark v. Waterman*, 29 Id. 150.

HIGGINBOTTOM v. SHORT.

[25 MISSISSIPPI, 160.]

COURT OF EQUITY IN ADMINISTERING JUSTICE adapts itself to the peculiar circumstances of each case brought before it.

PARTITION IS RIGHT which a tenant in common may claim from his co-tenant at any time.

WHERE EQUITABLE PARTITION CAN NOT BE MADE, owing to the nature of the property, a court of equity will grant relief by decreeing a sale of the property and dividing its proceeds among the co-tenants.

APPEAL from the circuit court of Tishamingo county. Partition. The facts are stated in the opinion.

B. N. Kinyon, for the plaintiff.

R. C. Rives, for the defendant.

By Court, FISHER, J. The defendant in error filed his bill on the chancery side of the circuit court of Tishamingo county against the plaintiff in error, praying the court to decree a sale of a quarter-section of land, upon which is situated a mill, in said county, held as tenants in common by the parties, on the ground that the mill constituting the main value of the premises, an equal partition can not be made; and also praying for an account to be taken of the profits of the mill for a certain number of years.

The court below decreed according to the prayer of the bill. From which decree a writ of error has been prosecuted to this court.

But one fact may be considered as in issue, and that is, whether a partition of the land can be made according to principles of equity. It is true, a great many other matters are introduced, both by the pleadings and evidence; but this will be found to be the only important question.

A court of equity in administering justice adapts itself to the peculiar circumstances attending each case brought before it. Partition is a right which a tenant in common may claim from his co-tenant at any time. But as the rights of both parties were equal while the estate in common was enjoyed, they must be made equal in its division. In such case, equality is equity. The court, then, must determine whether it can, according to this principle, permit each party to enjoy his rights in severalty to the land in controversy. If so, it will order partition to be made. If, on the contrary, from the indivisible nature of the property, partition can not be made according to the principle of equality, the court must still grant relief, by adapting itself to the peculiar circumstances of the case, and making a decree which will protect the rights of both parties; and this can only be done by a sale of the property, and dividing the money. Equality in this way can be arrived at, and justice done to both parties.

It is clear from the proof in the record that an equal partition of the land can not be made.

We therefore affirm the decree of the court below.

EQUITY, RULES GOVERNING EXERCISE OF: See the following cases: *Wilder v. Keeler*, 23 Am. Dec. 781; *Bowden v. Schatzell*, 23 Id. 170; *Grimstone v. Carter*, 24 Id. 230; *Henderson v. Overton*, 24 Id. 492; *Chamberlain v. Thomp-*

son, 26 Id. 390; *De la Vergne v. Evertson*, 19 Id. 411; *Gallion v. McCuslin*, 12 Id. 208; *Lining v. Geddes*, 16 Id. 606; *Mitchell v. Bunch*, 22 Id. 669; *Nevitt v. Gillerpie*, 26 Id. 696; *Blight's Heirs v. Banks*, 17 Id. 136, and notes to same referring to other cases in this series.

PARTITION, WHO MAY CLAIM.—Partition in equity is a matter of right, and not of discretion, in all cases where the complainant is entitled to partition at law, and can show a clear legal title: *Wisely v. Findlay*, 15 Am. Dec. 712. A tenant in common is entitled to a partition, however inconvenient or injurious it may be to make it: *Hanson v. Willard*, 28 Id. 162. See also *Louvale v. Menard*, 41 Id. 161; *Harman v. Kelley*, 45 Id. 552; and *Batterton v. Chiles*, 54 Id. 539, and notes to same, citing other cases in this series. “Partition, in some form, unless waived by an agreement between the co-tenants, is something to which each has an absolute and unconditional right. In invoking the aid of a court of competent jurisdiction to enforce this right, he need not show any special cause for the partition:” Freeman on Cotenancy and Partition, sec. 433.

PARTITION, SALE OF PREMISES TO MAKE.—Where division in partition can not be made without manifest injustice, the commissioners may recommend a sale, and the court will judge of the propriety of confirming such a return: *Steedman v. Weeks*, 49 Am. Dec. 660. If a division can not be made without manifest prejudice to the interests of the proprietors, the court is authorized to direct a sale and a distribution of the proceeds among the owners: *Louvale v. Menard*, 41 Id. 161; *Striker v. Mott*, 22 Id. 646. “In the United States the manifest hardship arising from the division of property of an imitable nature has been generally, and almost universally, avoided by statutory provisions authorizing the sale of property when its division would tend to greatly depreciate its value, or otherwise to seriously prejudice the interests of the co-tenants; but enough may be gathered from the American decisions to show that they in general indorse the English adjudications on this subject:” Freeman on Cotenancy and Partition, sec. 433.

LAURISSINI v. CORQUETTE.

[25 MISSISSIPPI, 177.]

LESSOR OR PLAINTIFF, IN ACTION OF EJECTMENT, MUST HAVE LEGAL TITLE at the time of the demise laid, and at the time of the action brought.

LEGAL TITLE EXISTS ONLY FROM DATE OF ITS ACQUISITION, and can not be given in evidence to sustain an action of ejectment brought before it was acquired.

DOCTRINE OF RELATION HAS NEVER BEEN EXTENDED by courts further than to hold that a legal title when acquired shall relate back to the period when the right accrued to the property, so as to defeat subsequent claimants or incumbrancers holding adversely to the right.

APPEAL from the circuit court of Harrison county. Ejectment. The facts are stated in the opinion.

D. Mayes, for the appellant.

John Henderson, for the appellee.

By Court, YKKER, J. The declaration in ejectment in this case was filed on the twenty-fifth day of August, 1843, and the demise is laid on the twelfth day of June, 1843.

On the trial, the lessor of the plaintiff offered in evidence a patent from the United States, bearing date the thirteenth of December, 1844, and a patent certificate bearing date the sixteenth of November, 1844. These were objected to, as inadmissible as evidence of title under the demise laid in the declaration; but the objection was overruled, and a bill of exceptions taken to the judgment of the court. The whole case turns upon the correctness of that decision.

No rule is more universally recognized than the one insisted upon by the counsel for the plaintiff in error, to wit, that the lessor of the plaintiff, in an action of ejectment, must have legal title at the time of the demise laid, and at the time of action brought, to enable him to maintain the action: Adams on Eject. 32.

This position, as a general rule, is not denied by the counsel for the defendant in error, who admits, that at the time this action was brought the lessor of the plaintiff did not have the legal title, but only an equitable title, on which the action could not be maintained; but he insists, that by virtue of the patent certificate dated the sixteenth of November, 1844, and the patent of the thirteenth of December, 1844, he acquired the legal title, which by relation will be extended back to the date of the survey on the twelfth of June, 1824, and thus enable him to maintain the action brought while the legal title was still outstanding in the United States.

We have been at some pains to examine this doctrine of relation thus insisted upon by counsel, but do not find that the adjudged cases have ever been carried to the extent claimed in this case.

In looking at the various cases cited by the counsel for defendant in error in which this doctrine of relation has been applied, it will be seen that the plaintiff in ejectment, claiming the benefit of the rule, had at the commencement of his action a legal title to the premises in controversy. That title, it is true, might have been younger in date than the title opposed to him; but the court held, that in a controversy between two parties, each claiming under a patent deed or other instrument conveying the legal title, they "would examine the successive stages of the title from its incipient state until its final consummation by grant, and if found regular and according to law

in these progressive stages, the grant should relate back to the inception of the right, and have dignity accordingly:" *Ross v. Barland*, 1 Pet. 664.

And in those states where this rule has been established, it is acknowledged to be a departure from the common law, by the rules of which courts of law in trials pending in them could not look beyond or behind the patent, grant, or deed, and examine the progressive stages of title antecedent thereto: *Ross v. Barland*, *supra*.

But in all the cases in which this rule has been established, the contest was between two legal titles, and where the plaintiff in ejectment had a legal title at the commencement of the suit.

The case of *Ross v. Barland*, 1 Pet. 655, was a contest between patentees, each party claiming under a legal assurance of title at the commencement of the suit.

So in the case of *Jackson v. Dickenson*, 15 Johns. 309 [8 Am. Dec. 236], the question was not whether a deed, made after action brought, would authorize a party to maintain the action, but whether a sheriff's deed would relate back to the day of sale, so as to overreach a mortgage executed between the day of sale and the date of the deed.

The question in *Kane v. Mackin*, 9 Smed. & M. 387, was of a similar character.

The point decided in *Poole v. Fleeger*, 11 Pet. 185, was that a will registered in Tennessee, after the suit brought, might be read in evidence on the trial, as the registration would relate back to the commencement of the suit and the death of the party. But in that case the will itself conveyed the legal title to the parties. The probate and registration were merely evidence of the existence of the will, and did not pass the title.

We do not deem it necessary to review all the cases referred to by the counsel for the defendant in error. It is sufficient to remark, that in no case which has ever fallen under our observation has it even been held, that a party who commences an action of ejectment, having in him at the time only an equitable title, could maintain that action by afterwards acquiring the legal title, upon the ground that the legal title so obtained existed by relation before the commencement of the suit. As we can find no precedent for such a rule, we are unwilling to establish so wide a departure from the established doctrine of the common law in actions of ejectment. The courts have never extended the doctrine of relation further than to hold that a legal title when acquired shall relate back to the period when

the right accrued to the property, so as to defeat subsequent claimants or incumbrancers holding adverse to the right. But still, in law and in fact, the legal title exists only from the date of its acquisition, and can not be given in evidence to sustain an action of ejectment brought before it was acquired. If the demise in this case had been laid and the action of ejectment brought after the issuance of the patent, then the lessor of the plaintiff might have contended, that although his patent only issued in December, 1844, yet his right accrued on the twelfth of June, 1824, when the land was surveyed, or at the date of the act of congress in 1819, under which he claims the land in controversy.

Let the judgment be reversed and cause remanded.

PROOF OF DEFENDANT'S POSSESSION IN EJECTMENT, necessity and sufficiency of to support the action: See *Cooper v. Smith*, 11 Am. Dec. 658; *Den v. Snowbird*, 22 Id. 496; *Newman v. Foster*, 34 Id. 98; *Casey v. Inloes*, 39 Id. 658; *Stewart v. Case*, 42 Id. 534; *Pickett v. Doe*, 43 Id. 523; *Thomas v. Orrell*, 44 Id. 58; *McLaurin v. Salmons*, 52 Id. 563; *Givens v. Mullinax*, 56 Id. 706, and notes thereto.

DOCTRINE OF RELATION.—For a full discussion of this topic, see note to *Jackson v. Ramsey*, 15 Am. Dec. 242.

LISLOFF v. HART.

[25 Mississipp., 245.]

WHERE A PURCHASES LAND WITH B.'S MONEY, and takes the title in his own name, generally a trust results in favor of B.; but if A. be the father of B., such purchase is generally regarded as an irrevocable advancement to the latter.

VOLUNTARY SETTLEMENT IS NOT REVOCABLE.

DEED MADE TO HINDER, DELAY, AND DEFRAUD CREDITORS is void.

APPEAL from the northern district chancery court at Carrollton. The facts are stated in the opinion.

Charles Sheppard, for the appellant.

George, for the appellees.

By Court, YERGER, J. In 1846, Philip Lisloff contracted for the purchase of a tract of land situated in Carroll county, from Isaac H. Hanah, and on the payment of the purchase money by him, Hanah, at his request and direction, conveyed the land by deed in fee simple to his son, Charles Lisloff, jun. Subsequently, in 1848, Hanah, at the request of Philip Lisloff, made

another deed, by which he conveyed the land to Charles Lisloff, sen., a brother of Philip, antedating this deed of the year 1846, and the deed to Charles Lisloff, jun., was then destroyed. Charles Lisloff, sen., afterwards, at the request of Philip, conveyed the land in trust to a man named Wales, to secure the payment of certain promissory notes made by Philip Lisloff to the defendant Osburn. Osburn was present when the deed to Charles Lisloff, jun., was destroyed, and was aware that it was destroyed for the purpose of procuring Hanah to make another deed to Charles Lisloff, sen., in order that he might execute the deed of trust to secure the notes.

On the facts disclosed by this record, although the purchase money was paid by Philip Lisloff, we must consider it as an advance made to his son, and the conveyance of the land as a voluntary settlement by the father upon him. The deed made to the son by Hanah vested the title to the land in him, and the subsequent destruction of it did not divest it. The second deed made by Hanah to Charles Lisloff, sen., is inoperative, and can not defeat the right of the son to the premises.

It is certainly true, as a general rule, where A. purchases a tract of land with the money of B., and takes the title in his own name, a trust results in favor of B. Yet where a father purchases, with his own money, property in the name of his child, it is, as a general rule, held and considered an advance or settlement upon the child; and although it be a voluntary settlement, yet, as we held at the present term of this court, in the case of *Norman v. Burnett*, 25 Miss. 183, it is not revocable by the father. See also *Verplank v. Sterry*, 12 Johns. 548 [7 Am. Dec. 348], and *Bale v. Newton*, 1 Vern. 464, where the court say: "A settlement, though voluntary, is not revocable."

Osburn, in his answer, states that the conveyance was made to the son in order to hinder, delay, and defraud the creditors of the father; but there is not the slightest proof on this point. He also suggests that the deed was made to Charles Lisloff, jun., by mistake of the draftsman, it having been intended by Philip Lisloff that the conveyance should be to his brother, Charles Lisloff, sen. The testimony of Harris, who drew the deed to the son, proves the very reverse of this suggestion.

Osburn likewise states that, in 1846, before the deed to Charles Lisloff, jun., had been destroyed, and before the execution of the deed to the uncle, Charles Lisloff, sen., believing that Philip Lisloff was the real owner of the land, he had purchased from him one half of four acres of the land, and of a

saw-mill erected thereon, and that Philip told him at that time that he was the owner of the land, and had a deed for it to himself.

This statement can not avail the defendant for several reasons: 1. Because it is matter in avoidance, and there is no proof of it whatever, except the statement in the answer; 2. Because he does not state that he had paid to Philip Lisloff the purchase money before he was informed of the title of Charles Lisloff, jun.; and, 3. Because the legal title never was in Philip Lisloff; and therefore, by this deed, Osburn did not obtain the legal title, and can not claim to be a *bona fide* purchaser for valuable consideration without notice. If he saw fit to rely upon the statement of Philip Lisloff, that he had the title, without demanding its production, he must abide the consequences of his own confidence; and if it has turned out that these representations were false, he can not impute his injury to any other cause than his own laches.

Nor does this case fall within that provision of the statute of frauds, Hutch. Code, 637, which declares: "If any conveyance be of goods or chattels, and be not on consideration deemed valuable in law, it should be taken to be fraudulent within the act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged or proved, and such deed, if for real estate, shall be acknowledged or proved and recorded in the county where the land conveyed is situated."

The conveyance in this case was from Hanah to Charles Lisloff, jun., and was for valuable consideration, to wit, the purchase money paid by the father, Philip Lisloff. Hanah was the grantor of the deed, and if it had not been recorded, subsequent purchasers or creditors of his, without notice of its existence, might have avoided it, because it was not recorded; but neither the letter nor reason of this part of the statute can be made to apply to purchasers or creditors of Philip Lisloff, in whom the title was never vested, and who, therefore, never had any interest in it which creditors could reach, or any title which he could convey to a purchaser. It must be understood in this connection, that we are treating the money advanced by Philip Lisloff as a *bona fide* settlement and advancement upon his son, because if there had been proof that he had advanced the money for the purchase of the land himself, and had the deed made to his son, with the intent to hinder, delay, or defraud his creditors, or to defraud or deceive those who might afterwards purchase the land from him, then the deed would be

avoided by other provisions of the statute of frauds. But as we have before remarked, there is not the slightest proof of any such intent. The decree of the vice-chancellor must be reversed, and a decree rendered in this court in favor of the appellant, granting the relief sought by the bill.

WHERE LAND IS PURCHASED WITH MONEY OF TWO OR MORE PERSONS, and the conveyance taken by agreement in the name of one them, a resulting trust arises in favor of the others: *Dow v. Jewell*, 45 Am. Dec. 371; *Pinnock v. Clough*, 42 Id. 521; *Padgett v. Lawrence*, 40 Id. 232; *Weeks v. Haas*, 39 Id. 46; and note to *Neill v. Keese*, 51 Id. 746, where the subject is treated at length.

PURCHASE OF LAND BY FATHER IN NAME OF HIS SON, for the purpose of defrauding creditors, is void as against subsequent as well as existing creditors: *Elliott v. Horn*, 44 Am. Dec. 488. A conveyance to the children of the grantor is void as against creditors, where it is shown that the conveyance included all the property of the grantor, real and personal, and was made to children of tender years who were living with him at the time, and that he thereafter continued in possession, selling, renting, and hiring portions of the property and applying the proceeds to his own use: *Lewis v. Love's Heirs*, 38 Id. 161. And a voluntary conveyance from father to son is void as to subsequent bona fide purchasers from the father without notice: *Freeman v. Eatman*, 40 Id. 444.

VOLUNTARY SETTLEMENT MADE FOR BENEFIT OF WIFE AND CHILDREN, if fair at the time, will be good against subsequent creditors of the person making the deed: *Hester v. Wilkinson*, 44 Am. Dec. 303; see also *McVicker v. May*, 45 Id. 637.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

SMITH v. BUSBY.

[16 Missouri, 387.]

Covenant to Convey by Deed, with general warranty, is not satisfied by the mere execution of a formal instrument with covenants of title, as it implies that the covenantor will convey an indefeasible estate, and that his deed shall be operative for that purpose.

Maker of Note may make same defense against Assignee that he might have made against the assignor or payee.

Total or Partial Failure of Consideration in a note or bond may be given in evidence to defeat or diminish the recovery in an action on those instruments.

Insolvency will not avail as defense, nor bar a recovery of money promised in an action at law, when the consideration is an act to be performed subsequent to the insolvency.

Vendee Intending to Rescind his Contract should Relinquish Claim to the vendor and abandon possession.

Appeal from Clinton circuit court. The facts are stated in the opinion.

Loan and Vories, for the plaintiff.

S. L. Leonard, for the defendant.

By Court, Scott, J. This was a petition in debt in attachment, begun by Smith, assignee of John Townsend, against Milton Busby, on a note executed by Busby for three hundred and thirty-seven dollars and fifty cents, payable the fifteenth of May, 1847, and dated May 20, 1845. Plea, the general issue. On the trial, after proving the assignment, the plaintiff read the note in evidence, after which the defendant proved that the note sued on was given as part purchase money for two tracts of land of one

hundred and sixty acres each. At the time of giving the note, a certificate of pre-emption was passed to Busby for one quarter-section, and a bond executed by Townsend, the assignor, of the note in suit. The note sued on was of those mentioned in the bond which was identified by the witness. The bond was then read in evidence, from which it appeared that Townsend bound himself in the penalty of one thousand and eight hundred dollars to Busby, conditioned to make to Busby a warranty deed to the north-east quarter of section 33 in township 57, range 35, on the payment of eight hundred and seventy-five dollars, in three notes bearing even date with the bond. The bond was dated May 20, 1845. The defendant then read a patent for the above tract of land, issued by the state of Missouri to S. L. Leonard, and proved by him that the said land had been selected by the state, under the authority of the United States; that he purchased Townsend's interest therein, who had a pre-emption thereto, and had proved up the same at sheriff's sale on an execution against Townsend, who was now insolvent.

The plaintiff then proved by an agent of Busby that he rented the land to Townsend for one hundred dollars, and took his obligation therefor, which was delivered by Busby, who afterwards received the rent; that when Townsend sold the land to Busby and executed the above title bond, certificates of pre-emption had not been issued. Townsend and Busby went to the office to prove Townsend's right to pre-emption, but in consequence of some previous omission it was not then proved, but shortly after the certificate was issued, and it, together with the bond and the obligation for rent, was placed in the agent's hands, by whom they were delivered to Busby. The plaintiff then offered to prove that of the three notes, mentioned in the above bond, one was payable before that on which this suit was brought, and that the other was not due. This evidence was rejected. The plaintiff also offered in evidence the following agreement between Busby and Leonard, which was also rejected:

"Whereas, we, the undersigned, have severally claims to the north-west quarter section 34, township 57, range 35, and the north-east quarter section 33, township 57, range 35; and whereas the undersigned, Milton Busby, has actually paid out some nine hundred dollars for said north-west quarter of section 34; and whereas, the undersigned, Solomon L. Leonard, is satisfied that he has an indefeasible title to both said quarters, but in consideration that it would be hard for said Busby to

entirely lose said nine hundred dollars, and also to suppress strife and bickering and to promote kind feelings, and also in further consideration of two hundred and sixty-six dollars and thirty-three cents, the entrance money which said Leonard paid therefor, with interest to the present time, by said Busby to said Leonard paid, said Leonard has made a deed of conveyance of said north-west quarter section 34 to said Busby, and said Busby declares that he has no just claim for said north-east quarter section 33, and that he will in no manner molest or harass said Leonard about said last-mentioned quarter, but, on the contrary, he declares himself satisfied with the arrangement above set forth.

"Witness our hands and seals this twelfth day of November, in the year of our Lord 1847.

"SOLOMON L. LEONARD. [Seal.]

"MILTON BUSBY. [Seal.]"

From this state of facts, the question arises whether there was a failure of the consideration of the note sued on, or whether the plaintiff is entitled to recover. In the consideration of this question, the evidence offered and rejected will be regarded as in the case, and the facts it tended to prove will be taken as true.

In the court below the plaintiff submitted to a nonsuit in consequence of an instruction to the effect that the land having been purchased by Leonard from the state, before the commencement of this suit, and he is still holding title to the same, and Townsend being unable to make a good title to the land, and insolvent, the consideration of the note sued on has failed.

It may be conceded that a covenant to convey by a deed with general warranty is not satisfied by the mere execution of a formal instrument with covenants of title, but implies that the covenantor will convey an indefeasible estate, and that his deed shall be operative for that purpose. It may likewise be admitted, for it is statute law, that the maker of a note sued on may make the same defense against the assignee that he might have made against the assignor or payee.

At common law a failure of the consideration of a bond, whether partial or total, was no defense to an action on the instrument. A partial or a total failure of the consideration of a note might be used as a defense to an action upon it. Our statute has now abolished all distinctions between bonds and notes in this respect, and a failure of consideration, in whole or in part, may be given in evidence to defeat or diminish the re-

covery in an action on those instruments: Code 1845, p. 832. Notwithstanding this provision, we are still left to general principles to ascertain what is a failure of consideration. Where a party has promised another to pay him money on a given day, in consideration of an act to be performed subsequently to that day, the insolvency of him who is to perform the subsequent act is no bar to a recovery of the money promised in an action at law. How far such a consideration would influence courts of equity, it is not necessary now to determine. Nor would the inability of a party to do an act presently, which was to be performed in future, prevent his recovery of the consideration which had been promised to be paid for the act before the arrival of the period for the performance of the thing stipulated to be done. Though a party may be unable to do an act to-day, it does not follow that he may not be able to do it six months hence. That lands have been sold to a third person which a party has promised to convey to another in future does not necessarily preclude the idea that the party promising will not be able to perform his undertaking. It is a settled principle that if a day be appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen, may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent: *Pordage v. Cole*, 1 Saund. 320. In *Johnson v. Wygant*, 11 Wend. 48, it was held that on a contract for the sale of lands, by a vendor against a vendee, in which the consideration money is to be paid in installments, and the conveyance to be made upon payment, if suit is delayed until all the installments are due, the covenants then become dependent. In this, however, the action was on a covenant, and the breach assigned was the non-payment of all the installments. So it appears the whole sum was due by a single instrument. A difficulty may arise in the application of the principle of the above case to those circumstanced as the one now under consideration, where separate securities are given and separate suits become necessary. If the securities should be assigned to different persons, in case of a partial failure of consideration, how would it be apportioned among the different holders—would the maker use the defense against which of them he pleased? would the last assignee be first resorted to? or would the contribution

be in proportion to the respective amounts of the notes? But one assignee being before the court, how would the date of the assignments be ascertained? *Clowes v. Dickenson*, 5 Johns. Ch. 235.

But this case steers clear of this difficulty, as it appears that one of the notes was not due.

The defense to this action is an entire failure of consideration; but viewing the subject in the most liberal manner for the defendant, Busby, we do not see how it can be supported. He was put in possession of the land; he received rent for it. He had the very thing he contracted for. It is unjust to take possession of land under a contract of sale, retain it, and yet refuse to pay the purchase money. The vendor should have his money or his land, and if the vendee intends to rescind the contract, he should relinquish his claim to the vendor, and abandon the possession. The defense set up can only be maintained on the ground that Busby has a right to rescind the contract. Can he now do this? Has he not placed himself in a situation by which he is restrained from such a course? By his contract with Leonard, he has disposed of the very land the price of which, in part, is the subject of this controversy. The caution with which he has worded his agreement will not avail him. In it he recites that he had a claim to this very land, and although there is a subsequent disclaimer of title, and a total omission of all words of conveyance, yet the transaction would seem to amount to a release in effect. For a valuable consideration, he has precluded himself from an inquiry into the legality of the proceedings on the part of Leonard. It is impossible to read the agreement between Leonard and Busby and say it was not an assumption of the power on the part of Busby to dispose of the land whose value is the subject of this suit. If Busby should now rescind his contract with Townsend and put him upon Leonard, what consideration will Leonard have received for his conveyance of the north-west quarter-section to Busby. If Busby intends to rely upon a rescission of the contract, he should have taken no step by which his right to do so could be compromised.

The other judges concurring, the judgment will be reversed and the cause remanded.

CONVEYANCE CONTAINING GENERAL WARRANTY, EFFECT OF.—Where the grantors had conveyed all their right, title, and demand in the premises, with warranty against all persons claiming by, from, or under them, the court held that the grantor was estopped from denying the warranty: *Comstock v.*

Smith, 23 Am. Dec. 126; *Trull v. Eastman*, 37 Id. 126; *Moore v. Merrill*, 43 Id. 593; *Ross v. Turner*, 44 Id. 531; *Sweet v. Brown*, 45 Id. 243, and notes to same cases.

WHERE DEFENSE IS FOUNDED UPON TOTAL OR PARTIAL FAILURE OF CONSIDERATION, or upon the fraudulent acts or representations affecting the consideration, the special facts must be pleaded: *Huston v. Williams*, 25 Am. Dec. 84.

WHEN INSOLVENCY WILL BE CONSIDERED AS DEFENSE TO BAR RECOVERY ON NOTE.—Before a note can be pronounced wholly worthless that is actually due and legally binding upon the maker, it must appear not only that he is at present unable to pay any part of it, but it must be shown beyond all reasonable doubt that such inability will continue for the future: *Evans v. Gale*, 43 Am. Dec. 614.

VENDOR'S RIGHT TO IMMUNITY FROM ACTS TO HIS PREJUDICE by a purchaser in possession does not depend on the vendor's having title to the land at the time of sale; and a purchaser can do nothing towards the prejudice of his vendor's right so long as that relation continues: *Meadows v. Hopkins*, 33 Am. Dec. 140; *Greeno v. Munson*, 31 Id. 605; *Fowler v. Cravens*, 20 Id. 153, and notes thereto.

THE PRINCIPAL CASE HAS BEEN FOLLOWED extensively in the courts of Missouri, and is a recognized authority upon the point which it decides: See *Dietrich v. Franz*, 47 Mo. 87; *Butler v. Manny*, 52 Id. 503; *Turner v. McElher*, 59 Id. 536; *Cooper v. Stockton*, 60 Id. 85; *Smith v. Hutchinson*, 61 Id. 88; *Harvey v. Morris*, 63 Id. 478; *Lockwood v. Railroad*, 65 Id. 236.

KUYKENDALL v. McDONALD.

[15 MISSOURI, 416.]

CONTINUED POSSESSION OF PERSONAL PROPERTY, AFTER EXECUTION SALE, by former owner, is presumptive evidence of fraud, and becomes conclusive, unless the vendee shows that the sale was made in good faith and without intent to defraud creditors.

FRAUDULENT INTENT IS QUESTION FOR JURY.

DEBTOR MAY GIVE PREFERENCE TO PARTICULAR CREDITOR, or set of creditors, and an assignment or payment for that purpose will be valid, when the same has not been done to secure the property to himself.

MONEYED CONSIDERATION FOR GOODS MUCH DISPROPORTIONAL TO THEIR VALUE will not take a case out of the statute, unless the same is unreasonably inadequate.

RECORDING ABSOLUTE BILLS OF SALE of personal property, being an unauthorized act, avails the parties nothing, when the question of fraud is raised.

APPEAL from Platte circuit court. The facts are stated in the opinion.

Leonard, for the plaintiff.

Hayden and Gardenhire, for the defendants.

By Court, Scott, J. McDonald, the defendant, having obtained a judgment against William G. Burnes and John S.

Light, levied his execution upon property in the possession of Light. Thereupon, Middleton, Perry & Co. claimed the property, and demanded an inquisition by the sheriff to ascertain its ownership. Middleton, Perry & Co. having obtained a verdict, McDonald, the plaintiff in the execution against Burnes & Light (but defendant here), then gave to the sheriff a bond of indemnity, and required him to sell the property levied on. This was accordingly done, and this suit was brought to the use of Middleton, Perry & Co., the successful claimants of the property seized under execution, in the name of James Kuykendall, to whom, as sheriff, the bond was executed.

The defense to this action was, that the conveyance of the property to Middleton, Perry & Co., executed by Light to them, and under which they claimed, was void, being made to hinder and delay his creditors. In consequence of the directions of the court below, the plaintiff took a nonsuit, and after an unsuccessful motion to set it aside, sued out a writ of error from this court.

Middleton, Perry & Co. claimed the property levied on by virtue of a conveyance made by Light, the sixth of April, 1846, and recorded. The debt due by Light to McDonald, on which there were judgment and execution, was payable the third of June, 1845. The property levied on, and other property not taken by the sheriff, were conveyed to Middleton, Perry & Co., for the consideration of one thousand five hundred dollars, as expressed in the deed. Light also executed to Middleton, Perry & Co. a deed of two hundred and forty acres of land, in consideration of the sum of one thousand dollars. The land was public land, and in the opinion of some of the witnesses, not worth more than the government price, though at the trial it was proved to be then worth one thousand two hundred dollars. The property mentioned in the first deed was, at the time of sale, delivered to Middleton, Perry & Co., and immediately restored to Light, who also continued in possession of the land conveyed. There was evidence conduced to show that the property conveyed by Light was worth much more than was paid for it. The property levied on by the sheriff was found in the possession of Light. Evidence was produced showing that Light was indebted to Middleton, Perry & Co. in a considerable sum, at the time of the conveyances, and of their assuming to pay and paying debts due by him to others for a large amount.

It would be an endless task to copy and review all the instructions that were given and refused on the trial of this

cause, and it is not deemed necessary, as the argument in this court was confined singly to the question whether the remaining in possession by the vendee after an absolute sale of personal property is fraud *per se*, and so to be declared by the court as a matter of law; or whether, under the tenth section of the act concerning fraudulent conveyances, it only creates a presumption of fraud, which may be repelled by evidence satisfactory to the jury that the sale was made in good faith and without any intent to defraud creditors.

This revives the old question, whether the continuing in possession of personal property after a sale is a fraud in law, and so to be declared by the courts; or whether it is a fact to be put to the jury as evidence of fraud, who are the triers whether the transaction is fraudulent or not. The contrariety of opinion entertained by different courts, and the conflicting views in the same courts in relation to this question, induced the legislature at the late session to interfere and settle it definitely. It was hoped this had been done, and that the matter would not be again agitated. The fourth section of the act referred to prescribes how gifts of goods may escape the imputation of fraud, resulting from a want of possession in the donee. The eighth section shows how deeds of trust and mortgages, affected with a charge of fraud, growing out of the want of possession in the mortgagee and trustee, may avoid a like imputation. But the case of an absolute sale, with possession continuing in the vendor, stood on different considerations, and no provision was made for its protection. It was made a presumption of fraud, and a conclusive one, unless the jury was satisfied it was made in good faith, without any intent to defraud creditors. The tenth section of the act was borrowed from the code of New York. The section, however, in that code, did not contain the words "to the jury," and their omission continued the old controversy, whether fraud was a question of law for the determination of the court, or a question of fact to be submitted to a jury. It was to settle this controversy that the words "to the jury" were inserted in our statute, and it is submitted that their insertion leaves no doubt but that in all cases arising under the tenth section, the jury are the triers whether the transaction is fraudulent or not. The continued possession after the sale is presumptive evidence of fraud, and it becomes conclusive, unless the vendee shows that the sale was made in good faith, and without any intent to defraud creditors. The possession in the vendor is all that need be shown, in the first in-

stance, by the creditor contesting the validity of the transaction; and that being shown, the statute presumes it to be fraudulent; then the onus is thrown on the claimant of the property under the sale, to show from all circumstances surrounding the transaction its true character, in order to repel the presumption of fraud; and if he fails in his evidence to show that the sale was made in good faith, without any intent to defraud creditors, the presumption of fraud first raised by the law becomes conclusive evidence of the fact. In determining this question, the jury should not be satisfied with the mere absence of direct evidence of a fraudulent intent, in connection with proof of a valuable consideration. They should be satisfied that there was some good and sufficient reasons for leaving the property in the possession of the vendor. An agreement to permit a vendor to remain in possession of goods, after an absolute sale, is not the common course of business. It must therefore excite suspicion, and the interests of creditors in all such cases imperiously require that the vendee clearly explain how an absolute sale could have been *bona fide*, and yet the vendor retain the use and possession of the property sold.

In order to take a sale of goods out of the statute, it must not only be for a valuable consideration, but also *bona fide*; as if one knowing of a judgment and execution against another goes and purchases his goods in order to defeat the execution; although he may take possession, yet the sale will be judged fraudulent because his purpose is iniquitous: *Worseley v. De Mallets*, 1 Burr. 474. But cases of this kind should not be confounded with those which only amount to a giving of preference to one creditor over another. A debtor may give a preference to a particular creditor, or set of creditors, by a direct payment or assignment, if he does so in payment of his or their just demands, and not as a mere screen to secure the property to himself. The pendency of another creditor's suit is immaterial, and the transaction is valid, though done to defeat that creditor's claim: *Holbird v. Anderson*, 5 T. R. 235; *Pickstock v. Lyster*, 3 Mau. & Sel. 371.

In the many cases which have lately come up, arising under the statute concerning fraudulent conveyances, a great deal has been said about "a valuable consideration." Certainly a moneyed consideration for an assignment of goods much disproportioned to the value of goods assigned would not take a conveyance out of the statute. The consideration must be adequate. Not that courts will weigh the value of the goods

sold and the price received in very nice scales; but all circumstances considered, there should be a reasonable and fair proportion between the one and the other. Cases in which the question of inadequacy of consideration arises between the grantor and grantee of a deed, where suit is instituted for the purpose of setting aside the grant on the ground of imposition, are not applicable in determining a question of the fairness of a consideration between a vendee and creditor under the statute concerning fraudulent conveyances. What inadequacy of consideration would induce a court to set aside a conveyance at the instance of the grantor, on the ground of imposition, is an entirely different question from that degree of inadequacy which would avoid an assignment on the ground of fraud in a suit by a creditor or purchaser against the assignee. Inadequacy of price, when unreasonable, is evidence of a secret trust, and it is *prima facie* evidence that a conveyance is not *bona fide* if it is accompanied with any trust: *Oriental Bank v. Haskins*, 3 Met. 332 [37 Am. Dec. 140]. The law will not suffer a creditor, although he may have a just demand against his debtor, to use that debt as a screen to protect the debtor's estate from his other creditors, when that estate exceeds much in value the amount of the debt. When a creditor by fraud will attempt to defeat the claims of other creditors, there is no hardship in postponing his demand, although a just one, to those which he has endeavored to defeat.

The law not requiring absolute bills of sale of personal property to be recorded, the placing them upon record, being an unauthorized act, avails the parties nothing.

The other judges concurring, the judgment will be reversed and the cause remanded.

RETENTION OF POSSESSION OF PERSONAL PROPERTY BY VENDOR OR MORTGAGOR, EFFECT OF.—See the following cases and notes thereto: *Sturtevant v. Ballard*, 6 Am. Dec. 281; *Brooks v. Powers*, 8 Id. 99; *Clow v. Woods*, 9 Id. 348; *Read v. Staton*, Id. 740; *Ramsey v. Stevenson*, 12 Id. 468; *Peabody v. Carroll*, 13 Id. 305; *Babb v. Clemson*, Id. 684; *Rocheblave v. Potter*, 14 Id. 305; *Coburn v. Pickering*, Id. 375; *Bissell v. Hopkins*, 15 Id. 259; *Boardman v. Keeler*, Id. 670; *Fletcher v. Howard*, 16 Id. 686; *Hudnal v. Wilder*, 17 Id. 744; *Glasscock v. Batton*, 18 Id. 703; *Batchelder v. Carter*, 19 Id. 711; *Jennings v. Carter*, 20 Id. 635; *Divver v. McLaughlin*, Id. 655; *Swift v. Thompson*, 21 Id. 718; *Farr v. Simms*, 24 Id. 396; *Callen v. Thompson*, Id. 587; *Waller v. Todd*, 28 Id. 94; *Thornton v. Davenport*, 29 Id. 358; *Eagle v. Eichelberger*, 31 Id. 449; *Richmond v. Crudup*, 33 Id. 164; *Mason v. Bond*, Id. 243; *Briggs v. Parkman*, 37 Id. 89; *Crouch v. Carrier*, 41 Id. 156; *Calkins v. Lockwood*, 42 Id. 729; *Cocks v. Chapman*, 44 Id. 536; *McVicker v. May*, 45 Id. 637; *Mills v. Warner*, 47 Id. 711; *Fleming v. Townsend*, 50 Id. 318; *Kimball v. Thompson*, Id. 799.

FRAUD IS QUESTION FOR JURY: *Miles v. Stevens*, 45 Am. Dec. 621; *Briscoe v. Bronaugh*, 46 Id. 108; *Dodd v. McCraw*, Id. 301; *Brown v. Foree*, Id. 519; *Garland v. Chambers*, 49 Id. 63; *Forsyth v. Matthews*, 53 Id. 522, and notes citing other cases in this series.

DEBTOR MAY GIVE PREFERENCE TO PARTICULAR CREDITOR OR SET OF CREDITORS: See *Arthur v. Commercial & R. R. Bank etc.*, 48 Am. Dec. 719; *Forsyth v. Matthews*, 53 Id. 522.

INADEQUACY OF CONSIDERATION AS EVIDENCE OF FRAUD.—It is a rule that when parties understand fully what they are doing, and there is no fiduciary relation existing between them, mere inadequacy of price will not suffice to impeach a sale: *Bigelow on Frauds*, c. 2, sec. 9. A party attempting to impeach a sale for fraud must establish the fact that the transaction is invalidated by some of the elements which render it inoperative in equity. Mere inadequacy of consideration, though not coming within the general meaning of fraud, is a material fact, which may exist to such an extent in connection with other facts as to be proof of fraud: *Butler v. Miller*, 1 I. R. Eq. 195. In a case determined in Pennsylvania it was held "that gross inadequacy of consideration, though sufficient to shock the judgment of the court, is insufficient of itself to set aside an executed contract between the parties standing on an equality, though it might be otherwise of an executory contract:" *Davidson v. Little*, 22 Pa. St. 245. In this case one of the parties had disposed of his interest in property valued at upwards of eight thousand dollars for the mere pittance of three hundred and fifty dollars. But in *Surget v. Byers*, Hempst. 715, the court held that inadequacy of consideration in a sale, either private or judicial, so gross as to shock the conscience is presumptive evidence of fraud; see also *Burch v. Smith*, 15 Tex. 219; *Hamel v. Dundass*, 4 Pa. St. 178; *Boyd v. Ellis*, 11 Iowa, 97; *Mahon v. Reeves*, 11 Ala. 345. So where a vendor is greatly indebted, inadequacy of consideration is recognized as a mark of fraud, and when other circumstances are associated with it, it may be conclusive: *Barrow v. Baily*, 5 Fla. 9; *Bay v. Cook*, 31 Ill. 336; *Bryant v. Kelton*, 1 Tex. 415. In *Weber v. Weetling*, 3 C. E. Green, 441, the court held that a bid of one hundred dollars at a public sale of property worth fifteen hundred dollars, but upon which there were liens amounting to eight hundred dollars, was not so inadequate as to show fraud. But where property valued at twelve thousand dollars was bid off at public sale for four hundred dollars, it was held that such inadequacy afforded ground for relief: *Hodgson v. Farrell*, 15 N. J. Eq. 88. In a case in Maryland where property worth eight hundred dollars sold for two hundred dollars, the court refused to interfere: *Feigley v. Feigley*, 7 Md. 537. But where a county agreed to sell and transfer twenty thousand dollars' worth of railroad stock for two dollars, this was held to be unconscionable and fraudulent *per se*: *Macoupin Co. v. People*, 58 Ill. 191; *Madison Co. v. People*, Id. 456. So where real estate worth sixteen hundred dollars sold for fifty dollars, the sale was set aside: *Mitchell v. Jones*, 50 Mo. 438. For a more extended discussion of this subject, as well the question when inadequacy of consideration will be a ground for setting aside contracts and agreements, see the following cases and notes to the same: *Whitefield v. McLeod*, 1 Am. Dec. 650; *Pollard v. Lyman*, 2 Id. 63; *Woodfolk v. Blount*, 9 Id. 736; *Beard v. Campbell*, 12 Id. 362; *Seymour v. Delancey*, 15 Id. 270; *Pope v. Brandon*, 20 Id. 49; *Crane v. Conklin*, 22 Id. 519; *Hind v. Holdship*, 26 Id. 107; *Littell v. Zuntz*, 36 Id. 415; *Juzan v. Toulmin*, 44 Id. 448.

THE PRINCIPAL CASE WAS APPROVED AND FOLLOWED in *Potter v. McDowell*, 31 Mo. 74; *State v. Rosenfield*, 31 Id. 566; *Claylin v. Rosenberg*, 42 Id. 439.

DRAPER v. OWSLEY.

[15 Missouri, 613.]

OPPONDANT COMPROMISING SUIT BY EXECUTING NEW NOTE for a sum less than the amount sued for is bound by his act; and when sued on the note so given, is estopped from using a defense which should have been used in the suit brought upon which the compromise was founded.

The facts are stated in the opinion.

Lakenan, for the plaintiff.

Richmond, Harrison, and Hawkins, for the defendant.

By Court, RYLAND, J. From the above statement it will be seen that the question for the consideration of the court involves the liability of Owsley to pay the notes executed by him to Draper for Clifton, upon the compromise of the suit first brought against Owsley.

Owaley was security to Shropshire in a note for the payment of money to one Conway, upon a contract between Conway and the Hannibal Company, of which said company Shropshire was a member. This note was assigned to T. G. Draper, secretary of the Hannibal Company; upon the dissolution of the company, Shropshire having previously sold out his interest, the note of Shropshire and Owsley fell to the share of Clifton, and was assigned to him by Draper. Some years after the maturity of this note, suit was commenced upon it by Clifton against Owsley. This suit was compromised by Owsley and Draper, the agent for Clifton; Owsley giving his notes and time, for a less sum than the original debt, to Draper for Clifton, and Draper dismissing the suit. One of the notes given on this compromise is the foundation of the present action.

The defendant contends, that as this suit was commenced before a justice of the peace, he can avail himself of any defense which either law or equity can afford him, and consequently, as he supposes, he might have made a successful defense against the original suit brought by Clifton against him, that he is still entitled to go behind the compromise and now assert this same defense to these new notes.

The defendant knew all the facts and circumstances of the transaction; and having made a compromise, by which he has the suit against him dismissed, by giving his note for a less sum and obtaining time thereon, he is bound by these notes and can not go behind the compromise for defense he ought to have made against the original note. He is concluded by his

own compromise; it was fairly made with knowledge of all the facts; let him then abide by it.

But take it for granted that he could make this defense, what does it amount to? Will the facts set forth by him exonerate him from the liability as Shropshire's security to Conway? He contends, that as the Hannibal Company, of which Shropshire was a member, could not sue Shropshire, therefore the security is exonerated. He assumes the fact to be, that the company could not sue on the note. This may be true, as regards a court of law; but it is certain that Draper could not sue as assignee, regarding the words "secretary of Hannibal Company" as mere *descriptio personæ*.

If the defendant Owsley really supposed that no suit could have been maintained on the note of himself and Shropshire, he should have put that matter to the test, by giving the notice to sue allowed by our statute to securities.

It is the opinion of this court, that the facts relied on by the defendant do not constitute a valid defense to this action.

The judgment of the court below, with the concurrence of the other judges, is affirmed.

COMPROMISE WILL NOT BE SET ASIDE EXCEPT FOR FRAUD OR IMPOSITION.
A compromise of a doubtful right, procured without such deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their rights: *Hoge v. Hoge*, 26 Am. Dec. 52; *Mills v. Lee*, 17 Id. 118; *Chahoon v. Hollenback*, 16 Id. 587. See also the following cases: *Daniels v. Hatch*, 47 Id. 169; *De Louis v. Meek*, 50 Id. 491.

KENNERLY v. SHEPLEY.

[15 Missouri, 640.]

EXECUTOR OR ADMINISTRATOR IS FULL REPRESENTATIVE OF CREDITORS of the estate committed to his care in the prosecution and defense of claims.

IN ACTION BROUGHT TO RESTRAIN ADMINISTRATOR from selling property to pay debts of a deceased person and to set up a lost deed, it is sufficient if the administrator and the heirs are brought before the court, as they fully represent the property and are liable for all demands against it.

ALLOWANCE OF CLAIM AGAINST DECEDENT'S ESTATE OPERATES AS JUDGMENT, but whether it will operate as a lien, *quare*.

ADMINISTRATOR AND HEIRS OF DECEDENT TAKE SAME RIGHT AND INTEREST in decedent's estate as decedent had.

STATE LAWS ARE NOT BINDING UPON OFFICERS OF FEDERAL GOVERNMENT, and a sale made by a United States marshal will be deemed valid until set aside by the federal court.

APPEAL from the St. Louis chancery circuit court. J. R. Shepley brought suit against E. M. Kennerly, deceased, and the widow of J. Kennerly, deceased, and the heirs of said Kennerly, praying an injunction restraining sale under order of probate court, and to prevent the making of any deed by the parties that might affect the title to a certain tract of land formerly owned by Kennerly and sold by the United States marshal to J. O'Fallon, under an execution issued out of the United States district court for Missouri. The deed so made was given to O'Fallon, and he disposed of the property to C. R. Anderson, the latter transferring it to W. C. Anderson, who mortgaged it to the Commercial Bank of Cincinnati. The mortgage was foreclosed, and the property was subsequently conveyed to Shepley. O'Fallon's deed had never been recorded. Kennerly, at the time of the execution of the deed to O'Fallon, was insolvent, and continued so till his death. His administrator denied plaintiff's right to the property, and claimed that the sale and deed made by the marshal were void. The other facts appear in the opinion.

Bates, for the plaintiff in error.

Spalding and Shepley, for the defendant.

By Court, Scott, J. The objection that the creditors were not made parties to the suit can not be maintained. In the prosecution and defense of claims, the executor or administrator is deemed a full representative of the creditors of the estates respectively committed to their care. The object of the suit being to restrain the administrator from selling property to pay debts of a deceased person, and to set up a lost deed, it was sufficient to bring before the court the administratrix and the heirs, who fully represented the property and are liable for all demands upon it: Story's Eq. Pl., sec. 150; Mitford's Pl. 166.

The allowance of a claim against a deceased person's estate is a judgment, and will be respected as such. But there is some difficulty in maintaining that those allowances are liens upon the estate. Formerly, when an execution could issue on a judgment in the circuit court against an administrator, it was held that such judgment was no lien upon the estate of the decedent in his hands. If there was no lien, when the lands could be sold under execution, it would be hard to maintain that a lien is created by the allowance of a demand in the county court. No argument will be made here on the subject,

but a reference to the case of *Prewitt v. Jewell*, 9 Mo. 723, will show what has been said on that subject. The administrator has no interest in the real estate to which a lien could attach itself by reason of a judgment against him. In the theory of our law, lands, upon the death of the ancestor, descended to his heirs, and there is a contingent power in the administrator to sell the lands to pay the debts, with a right to lease and preserve them until distribution is made. The administrator and heirs succeed only to the interest of the deceased. They can obtain no greater right than he had. The administrator and heirs, coming in as volunteers, the unrecorded deed was binding on them. The land was gone at the death of Kennerly. The power of affecting it in any way, to the prejudice of the unrecorded deed, was extinguished. It should not have been inventoried, or regarded as a part of the estate of the deceased. The creditors having no interest in the lot at the death of the intestate, and on his death the unrecorded deed being binding on the representatives, it was impossible that any right to the lot could accrue to them, which would subject it to the claim of creditors. If the lands should be sold by the administrator, he could only convey the right Kennerly had at the time of his death; and as to Kennerly, there was no right.

Considering the length of time from the execution and delivery of the marshal's deed, the evidence of its contents is sufficient. The formal parts of the deed were printed, and we are informed by the testimony that the marshal's deed was used in drawing a subsequent deed for the same lot, and moreover, that the court took the acknowledgment of the same.

It is objected that the sale of the lot, made by the marshal, was not in pursuance to the laws of Missouri in force at that time. The act of congress of the sixteenth of March, 1822, established a district court for the district of Missouri. That act conferred on said court the jurisdiction and powers which by law were given to the judge of the Kentucky district, under the act of September 24, 1789, and the act of the second of March, 1793, and the acts supplementary thereto. The seventh section of the act of the second of March, 1793, gives power to the courts of the United States to make rules and orders for their respective courts, directing the returns of writs of process, and to regulate the practice of the courts respectively. It is conceded that neither the act regulating process in the courts of the United States of the twenty-ninth of September, 1789, nor the act of the eighth of May, 1792, empowering the courts

to make such alterations and additions to the forms of writs, executions, and other processes they may deem expedient, were not in force in this state; those acts being confined in their operation to the states of the Union, in existence at the time of their passage. The sale in this case having been made prior to the act of congress of the nineteenth of May, 1828, adopting the practice of the state courts, for those states admitted into the Union subsequently to the twenty-ninth of September, 1789, we must look to the act of 1793 for the powers to be exercised by the district court of Missouri in relation to the execution of process emanating from that court.

It is no objection to the sale that it was not made in conformity to the law of this state, regulating sales under process of execution. The state laws, as such, are not binding on the officers of the federal government. They can only become so by being adopted by the laws of the United States or by the rules of their courts. When the sale was made, there was no written rule of the court. It had not exercised the power conferred by the seventh section of the act of 1793, of making rules regulating its practice and the returns of process. Under these circumstances the marshal made his sale, conforming as nearly as practicable to the laws of this state. In the case of *Wayman v. Southard*, 10 Wheat. 22, it was held that the fourteenth section of the judiciary act of 1789 authorizes courts to issue writs of execution. In the same volume, in the case of *Bank of United States v. Halstead*, Id. 51, it was maintained that the courts can so alter their process as to sell lands on execution when not subject to sale by the state laws. These cases arose in Kentucky, not one of the states in existence in September, 1789. The case of *Fullerton v. Bank of United States*, 1 Pet. 604, originated in the state of Ohio, at a time when the powers of the federal courts in that state were similar to those intrusted to the district court of Missouri at the time of this sale. This case maintains that a practice or mode of procedure could be adopted by usage, without written rules. The taking the acknowledgment of the deed was evidence of the sanction of the usage by the court. Such a circumstance must have brought the matter to the attention of the court, and had the manner of conducting the sale been disapproved, the acknowledgment would not have been taken, and a written rule would have been made for the conduct of future sales. We do not see the force of the objection that the usage had not been long practiced. It was conformed to in many cases, sufficient to

make it known, and when the usage was established, its effect must be to sustain and support instances under it occurring, as well before as after it had been much practiced. It would sustain the very first instance under it.

The deed executed by O'Fallon and wife to Mrs. Kennerly, having never been delivered, and being canceled in the presence of her husband, with his assent and that of the grantor, could convey no title to her.

Judge Ryland concurring, the decree below will be affirmed.

GAMBLE, J., did not sit in this cause.

CREDITORS MAY LOOK TO EXECUTOR as the proper representative of his testator's estate, until he has been duly discharged: *N. O. & C. R. R. Co. v. Kerr*, 41 Am. Dec. 323. An executor is regarded in equity as a trustee for the creditors and legatees: *Petrie v. Clark*, 14 Id. 636.

WHO MAY BE JOINED AS PARTIES DEFENDANT IN ACTION AGAINST ESTATE IN TRUST: See note to *Collins v. Loftus*, 34 Am. Dec. 722.

ADMINISTRATOR OR CREDITOR OF DECEASED PERSON can derive no greater benefit from his contracts with other persons, or from the equitable relation in which he stood during his life-time to them, than the deceased would be entitled to if still living: *Fletcher v. Grover*, 35 Am. Dec. 497. A deed by an administrator conveys only such estate as his intestate had: *Adams v. Cuddy*, 25 Id. 330; *Ewing v. Higby*, 28 Id. 633.

JURISDICTION OF STATE COURTS OVER ACTS OF UNITED STATES MARSHALS: See *Dunn v. Vail*, 12 Am. Dec. 512; *Lowry v. Erwin*, 39 Id. 556, and notes.

THE PRINCIPAL CASE WAS CITED AND FOLLOWED in *Miles v. Davis*, 19 Mo. 414; *Keene v. Barnes*, 29 Id. 384; *Baker v. Underwood*, 63 Id. 387.

GUION v. GUION'S ADMINISTRATOR.

[16 MISSOURI, 48.]

ADMINISTRATOR OF MOTHER CAN NOT SET UP CLAIM FOR SUPPORT AND EDUCATION of her child bestowed on him by herself, in an action by the child against the administrator to recover a sum received by the mother as guardian for him, where there is no evidence that she ever intended to make a charge for them; and in such a case the omission of the mother to render an account of the sums received by the child can not be construed into a purpose to apply them for his education.

APPEAL from the St. Louis circuit court. The opinion states the case.

C. B. Lord, for the appellant.

Lackland and Jamison, contra.

By Court, Scott, J. This was a claim, exhibited in the probate court of St. Louis county, against the appellant, in which the appellee, recovering less than he claimed, appealed to the circuit court, where on a trial anew, he recovered judgment against the appellant for one thousand four hundred and twenty-seven dollars and ten cents, the amount claimed and interest, from which judgment the appellant appealed to this court.

Josephine Guion, the intestate, was the mother of the appellee, and was appointed his guardian; in which capacity, between April, 1836, and October, 1837, she received from the estate of Madam Hebert, the grandmother of the appellee, the sum of one thousand and five dollars and seventeen cents. Hebert Guion, the father of the appellee, died in 1833, and Josephine, his mother, in 1843. The appellee was about nine years old at his father's death. Josephine Guion, the intestate, inherited an estate from her father, after the death of her husband, which yielded her an income of four or five hundred dollars a year. She had three children—two daughters and the appellee. One of the daughters married in 1834, and the other in 1841. She educated the appellee at the St. Louis University, where he continued three years as a full boarder, and one year as a half-boarder. The expense of sending a youth to the university was two hundred and fifty dollars a year. Josephine Guion never kept any account with her son, the appellee. Nor did she ever charge herself, as guardian, with the money received for him from his grandmother's estate. She never made any settlement as guardian. The court excluded, as evidence, a receipt given by the appellee to the appellant for one thousand eight hundred and four dollars, a distributive share of his deceased mother's estate. The appellant administered on Josephine Guion's estate. On the trial by the court, without a jury, a verdict was found for the appellee for the amount of his claim and interest. The appellant filed no set-off to the demand, but claimed that it had been extinguished by reason of the expense incurred by Josephine Guion for the appellee.

The cases in England, on the question of an allowance for past and future maintenance by a mother or father to a child, have arisen when the child has a fortune, and on the direct application to the proper tribunal by the parent. The case of *Bostwick, Matter of*, 4 Johns. Ch. 100, is the application of a mother for an allowance for past maintenance of her child. The law seems now to be well settled, both in this country and in England, that

applications of this sort will be entertained by the court having the management of the estate of wards and the care of their persons. Each case is governed by its own circumstances. If the estate of the child will warrant it, and the father is poor, an allowance will be made for its support, according to its expectations, and this without regard as to whether it is for past or future maintenance. When the father is of sufficient ability to support his child according to its expectation in life, he will not be allowed for its maintenance. The rule seems not to be so rigorous with respect to mothers: 2 Kent's Com. 191.

By the common law, the father is bound to support his minor children; and so long as he does, he will be entitled to their services. On the death of the father, this duty and right devolve on the mother, as succeeding to all the duties and obligations of her husband. The seventh section of the statute of 43 Elizabeth makes the father and grandfather, mother and grandmother, and the children, being of sufficient ability, of every poor person not able to work, liable for his support. This statute, although not in force here (its details making it local to England), yet has been regarded as a recognition of the principles of the common law.

In the case of *Cummings v. Cummings*, 8 Watts, 366, which was a suit brought by a mother's administrator against a child, and in its circumstances much like this, the court says: "The presumption, from a mother's maintenance of her child, whatever be the means of either, is, that she furnished it as a gift. If the child has nothing to recur to, the presumption is irresistible; and if it even has an estate, her omission to have it applied by a guardian is equally so. Perhaps one case could not be picked out of a thousand in which the presumption would not accord with the fact. They who would set bounds to the generosity of a mother know but little about the impulses of such a parent." We fully adopt the opinion of the court in Pennsylvania, not considering it as precluding a mother from an allowance for past maintenance, under circumstances in which it would be proper to give it. In the case of *Whipple v. Dow*, 2 Mass. 418, it is said: "If a mother support her child gratuitously, without any intention at the time of demanding a recompense, nothing is more clear than that she could not, upon a change of inclination, afterwards have an action therefor." This principle is necessary to secure to children the little patrimony they may inherit. Were mothers permitted to charge for support, as a matter of course, after it had been gratuitously

bestowed, it is easy to see that the estate of every child, by a former husband, would be at the mercy of a step-father, and the children of a mother surviving her husband, at the mercy of an administrator. The question in this case is, not whether the mother might not have applied to the court and had her son's estate appropriated for his support, but whether her administrator shall be allowed to set up a claim for the support and education of her child bestowed on him by herself, when there is no evidence that she ever intended to make a charge for them. It does not appear when Madam Guion was appointed guardian of her son; and her omission to render an account for the sums received for him can not be construed into a purpose to apply to them for his education. As the evidence of her having received the money was of record, had such been her intention, she would have kept an account with her son, or at least have charged him with the sums she expended in his education. We are aware that any general rule that may be established in relation to this matter may sometimes have a harsh operation. This is a frailty incident to all general principles. Under its cover an illiberal child may assert a claim against a deceased parent's estate, to the injury of his brethren, which may expose him to the imputation of a want of generosity.

For the honor of our nature, we trust such instances will be rare. But it is better to bear with such cases than to place the patrimony of orphan children at the mercy of step-fathers and the administrators of their mothers. The other judges concurring, the judgment will be affirmed.

CLAIM OF PARENT OR ONE STANDING IN LOCO PARENTIS FOR MAINTENANCE AND EDUCATION OF CHILD.—A father is under a natural obligation to maintain and educate his minor children: Schouler on Dom. Rel., secs. 235, 236; note to *Myers v. Myers*, 16 Am. Dec. 681, and cases cited; and it is only under peculiar circumstances that he is allowed to charge them for maintenance and education: *Tanner v. Skinner*, 11 Bush, 220; he would not be entitled to pay for the support of an adopted child as long as that relation existed: *Brown v. Welsh*, 27 N. J. Eq. 429. And as the relationship excludes implication of a promise, a grandfather can not recover for the maintenance of his grandchildren from the estate of their father unless there was proof of a previous request, a contract, and an express promise on the part of the father to pay for it: *Duffey v. Duffey*, 44 Pa. St. 399. But a father is under no legal obligation to support an adult widowed daughter and her infant offspring, and whether if he does so it is to be regarded as a gratuity from him to the daughter is to be collected from the circumstances: *Haynes v. Haggner*, 25 Ind. 174; and in *In re Marx*, 5 Abb. N. C. 224, it was held, contrary to the general rule, that a father was not obliged to support his minor children where they have property for their support; and in *Hottzman v. Castleman*, 2 McArthur, 555, the court decided that while it was the duty of a father to main-

tain his minor children, still when the minor had a separate estate, the father as a natural guardian had a right to apply so much of the income therefrom as might be necessary to defray the expense of giving the child a good education, and a court of equity in stating his account would allow him a reasonable credit for such expenditures, and would further allow him a credit for whatever portion of such income he had beneficially applied to the support of such child during the period of his minority; and in *Freeman v. Coit*, 27 Hun, 447; S. C., 15 N. Y. Week. Dig. 142, it was held, where a wife bequeathed certain property to her husband as executor in trust for the support of their minor children, that notwithstanding his liability as parent, he was entitled to charge the support of a child to her separate estate. These cases are opposed to the general rule, as a father is bound to support his minor children if of ability to do so whether they have property or not: See cases cited in note to *Myers v. Myers*, 16 Am. Dec. 661; and in the note to *Villard v. Robert*, 49 Id. 658. And the rule that a father can not charge for the support and education of his minor children is not changed by the fact that he is appointed guardian of them: *Walker v. Crowder*, 2 Ired. Eq. 478; *Burke v. Turner*, 85 N. C. 500; *Harland's Case*, 5 Rawle, 323; *Griffith v. Bird*, 22 Gratt. 73; and cases cited in note to *Villard v. Robert*, 49 Am. Dec. 658; but where a father was the guardian of the children, and possessing limited means was compelled to labor for their support, and in consequence of the decease of their mother was put to increased expense, it would be reasonable under the circumstances to charge a portion of the expense of their maintenance upon the income or interest of the shares of the wards: *Harring v. Coles*, 2 Bradf. 349. Another exception is grafted on the general rule where the father is indigent and unable to support the child in a proper manner, and the child has a separate estate; in such a case an allowance may be made the father out of the separate estate of the child for his support. This subject is discussed in the note to *Myers v. Myers*, 16 Am. Dec. 648. For a discussion of the subject of the liability of step-parents for the support of their step-children, and the relative rights, duties, and liabilities of persons occupying such relation to each other, the reader is referred to the note to *Bartley v. Richtmyer*, 53 Id. 338, where this subject is treated at length. The obligation resting upon the father does not extend to the mother; see the note to *Myers v. Myers*, 16 Id. 661; thus in *Wilkes v. Rogers*, 6 Johns. 566, where a father died intestate, leaving a large real and personal estate, it was held that the mother was entitled to be allowed out of the portion of the estate belonging to the children for their support during their infancy and for the time past as well as to come. But the law raises no implied promise; and from the mere fact of a mother's maintenance of her children, the presumption is that she furnished it gratuitously: *Cummings v. Cummings*, 8 Watts, 366; *Seitz's Appeal*, 87 Pa. St. 159.

Guardians, unlike fathers, are not personally responsible for the support and education of their wards: Schouler on Dom. Rel., sec. 337; and in their accounting they will be allowed a reasonable sum for amounts expended for these purposes: *Latham v. Myers*, 10 N. W. Rep. 924; *Porder v. Foster*, 23 Ga. 489; *Owen v. Peebles*, 42 Ala. 338; *Smith's Appeal*, 30 Pa. St. 397; whether a guardian will be allowed for expenditures exceeding the income of the ward's estate depends upon circumstances; this question is discussed in the note to *Villard v. Robert*, 49 Am. Dec. 654. A charge made by a guardian for the ward's board at an insane asylum is proper if the ward's estate is sufficient to justify the expenditure, and the charge should not be disallowed because the asylum bill was not paid, as the guardian is personally liable for such bill: *Corcoran v. Allen*, 11 R. I. 567; and where a guardian, as such,

lawfully contracts a debt for the maintenance and education of the ward, and such debt has been personally released to him by the creditor without his having paid the same, he and his sureties are entitled to a credit for the amount, with interest, in an action by a ward on his bond: *Kiney v. State*, 71 Ind. 32; and a guardian who is a merchant may, if he acts *bona fide*, supply the necessary wants of the wards from his own store, and may charge a reasonable profit on them: *Moore v. Shields*, 89 N. C. 50. It is the duty of a general guardian of an infant to provide for his support, maintenance, and education out of his estate, notwithstanding the father is living, if the father is poor and unable to support him; and for sums expended for this purpose, the guardian should be allowed in the settlement of his account: *Clark v. Montgomery*, 23 Barb. 464; and see *Cunningham v. Cunningham*, 4 Gratt. 43, a case turning on an analogous principle. The general rule is subject to exceptions. In *Marquess v. La Baw*, 82 Ind. 550, it was held to be a settled rule that a guardian who makes his ward a member of his family and receives his ward's labors as such could not charge for his board. And a charge for board and lodging in a guardian's account will not be allowed upon evidence that the ward worked as a laborer for the guardian and that the labor was equal to the value of the board and clothing: *Crosby v. Crosby*, 1 S. C. 337; *Hayden v. Stone*, 1 Duv. 396; and a ward who renders valuable services to the guardian while residing with him is entitled to set off the value of those services against his charge for board; but the burden of proof as to the value of such services is on the ward: *Calhoun v. Calhoun*, 41 Ala. 369. And where a guardian puts himself *in loco parentis* to his ward who has no estate, avails himself of his services, keeps no account with him, and does not in any other way manifest an intent to charge him for his maintenance, he can not, on his ward's becoming entitled to property, change the character of his past relations towards him and make a charge for his maintenance: *Bright's Appeal*, 15 Rep., N. S., 25. And an agreement between a guardian before his appointment and the mother of his wards, his wife, that they should be treated as his own children, and that their estate should be used for their education, under which they resided in his family and rendered him services, is sustained by a sufficient consideration and would preclude him from making charge for their support: *Bradford v. Bodfish*, 39 Iowa, 681. And an allowance for past maintenance will not be granted where one has taken and brought up an infant, as a member of his family, without any apparent claim or expectation until afterwards, and a guardian paying such charge can not hold the infant's estate therefor: *Folger v. Heidel*, 60 Mo. 284. So if minors were invited by their guardian to reside with him gratuitously, they shall not afterwards be made to pay for board, but he will be allowed for clothing and other necessaries furnished them: *McDowell v. Caldwell*, 2 McCord Ch. 43; as a guardian making a gratuity to his ward can not afterwards convert it into a charge against him: *Pratt v. McJunkin*, 4 Rich. L. 5; and proof of parol declarations of a guardian that she did not intend to charge her ward for board is admissible to repel a charge for board in her life-time exhibited by her representatives after her death: *Hooper v. Royster*, 1 Munf. 119.

So where a ward was the niece of the wife of the guardian, and lived with him as one of his family, worked therein, and was boarded, clothed, and schooled as one of his own children, and the guardian frequently declared to the ward and others that he regarded her as one of his children and would do by her as his own, and never applied to the court for an allowance for her support, and it did not appear that he had made any charge in his books for

her maintenance, the guardian is not entitled in his final account to a credit for her maintenance: *Horton's Appeal*, 94 Pa. St. 62. So, of course, an allowance would be refused a guardian where she lived with him and it appeared that he had expended nothing on the same, and where he never made such charge in his returns to the commissioner: *Booth v. Sineath*, 2 Stroh. Eq. 31; and if the guardian commit the custody and control of a female ward to a person who compels personal services from her, while her education and culture are wholly neglected, he will not be allowed a credit for her board within the value of her personal services: *Starling v. Balkum*, 47 Ala. 314. On an agreement by the guardian to maintain the minor at his own expense, as an inducement to the court to issue letters to him, he is bound by such offer, which was embodied in the order of appointment, and can not be reimbursed for his expenses in that regard: *Barg's Estate*, Myrick's Prob. 69; although in *Armstrong v. Walkup*, 9 Gratt. 372, it was held that a guardian of infants was entitled to compensation for their support, although he may have promised their friends he would not make any charge for it, and in fact kept no accounts against them. If a guardian, instead of loaning out or investing the funds of his ward which were in his hands at the commencement of the war, and hiring out the negroes, retained and used the money for his own benefit and became himself the hirer of the negroes, he can not be allowed in extinguishment of the debt thus incurred to claim credits for board, clothing, and tuition of the ward at Confederate prices: *Hutton v. Williams*, 60 Ala. 133. And if a guardian of minors loans money to their mother on her promise to charge such minors for their support and to give him the benefit of such charges, and she afterwards refuses to make any charge against them or to accept any compensation for their support, he is not entitled to an allowance therefor in settling his account with them as guardian: *Wyckoff v. Hulse*, 32 N. J. Eq. 697. In *Dalton v. Jones*, 51 Miss. 585, it was held that if a guardian contracted for the education and maintenance of his ward without the sanction of the chancery court, he incurred a personal responsibility, and could not be allowed for it in his account with his ward. And *Preble v. Longfellow*, 48 Me. 279, decided that a guardian was not authorized by law to make advances from his own means for the maintenance of his ward, but was bound to provide for such maintenance from the estate of his ward, and could not by making advances for the ward's support make the ward his debtor upon arriving at full age, and that an action could not be maintained by a guardian against his late ward when of age to obtain remuneration for such advances.

COLEMAN v. MCANULTY.

[16 MISSOURI, 178.]

WRIT REGULAR ON ITS FACE EMANATING FROM COURT OF SUPERIOR JURISDICTION is a justification to the officer acting under it.

OFFICER CAN PASS TITLE BY SALE UNDER WRIT wherever he can justify under the writ, if all other prerequisites to a sale have been complied with.

DEATH OF PLAINTIFF BEFORE JUDGMENT AGAINST GARNISHEE IS RENDERED does not render such judgment null and void.

PROCEEDINGS TO SET ASIDE JUDGMENT DO NOT AFFECT ONE NOT PARTY.

ERROR to the St. Louis circuit court. The opinion states the case.

T. T. Gantt, for the plaintiff in error.

Geyer and Dayton, contra.

By Court, Scott, J. The petition in this case stated that the appellant, Samuel M. Coleman, was the legal representative of James Coleman, in respect to the undivided half of a tract of land situated in St. Louis county. That a judgment was recovered by John P. Boyd, in the St. Louis circuit court, against Abraham Wooley; and James Coleman being summoned as a garnishee, a judgment against him, as a debtor of said Wooley, was entered at the suit of the said Boyd, who had departed this life at the time of the said garnishment. On the judgment against Coleman, an execution issued, by virtue of which, in March, 1834, his interest in the land above mentioned, being an equitable one, was sold to the respondent, who afterwards instituted proceedings in equity against Joseph Papin, the trustee of the land, and obtained a deed conveying the legal title of the same to him. In April, 1835, on motion of Coleman, the judgment against him was set aside and for naught held, it appearing to the court that the plaintiff, Boyd, had died before the judgment was rendered against Coleman. James Coleman afterwards died, leaving the respondent, his son. McAnulty was no party to the proceedings instituted to set aside the judgment. The petition prayed that the title of the respondent might be decreed to the appellant, and for the rents and profits of the land described. A demurrer to the petition was sustained, and the cause brought here.

1. The only question in the cause is, whether the judgment against the garnishee was void and a nullity, by reason of the death of Boyd before it was rendered. In maintaining the affirmative of this question, the appellant is not supported by any of the cases cited by him. The case of *Borden v. Fitch*, 15 Johns. 145 [8 Am. Dec. 225], and that of *Kelly v. Hooper*, 3 Yerg. 395, are both within the principle prevailing in some of the states, allowing the judgment of another state to be impeached for lack of jurisdiction: 2 Phill. Ev., Cowan & Hill's notes, 915. All that is contained in the case of *Woodcock v. Bennet*, 1 Cow. 735 [13 Am. Dec. 568], in relation to this matter, is taken from the case of *Parsons v. Loyd*, 3 Wils. 341, where it is said that "there is a great difference between erroneous process and irregular (that is to say, void) process; the first stands good and valid until it be reversed; the latter is an absolute nullity from the beginning." This was a suit against a plaintiff in an action for suing out a void *capias ad respondendum*, which had been set

aside. In the same case it was said that there was no remedy against the officer, for he was obliged to obey a writ emanating from a court of general jurisdiction. This is unquestionable law, that a writ, regular on its face, emanating from a court of superior jurisdiction, is a justification to the officer acting under it; and it is a general rule, that wheresoever an officer can justify under a writ, he can pass a title by a sale under it, if all other prerequisites to a sale have been complied with: *Cox v. Nelson*, 1 T. B. Mon. 95 [15 Am. Dec. 89]; *McKinneys v. Scott*, 1 Bibb, 155; *Reardon v. Searcy*, 2 Id. 202; *Coleman v. Trabue*, Id. 518. In 2 Tidd's Practice, 936, it is said: "If the judgment or execution be irregular, the party can not justify under it, for that is a matter in the privity of himself or his attorney; and if the sheriff or officer in such case join in the same plea with a party, he forfeits the benefit of his defense. The sheriff or officer, however, may justify under an irregular judgment, as well as an erroneous one, for they are not privy to the irregularity. And, so as the writ be not void, it is a good justification, however irregular, and the purchaser will gain a title under the sheriff; for it would be very hard if it should be at the peril of the purchaser, under a *fieri facias*, whether the proceedings were regular or not." In the case of *Warder v. Tainter*, 4 Watts, 278, the court says the authorities are abundant to show that in no case is a judgment, rendered by a court of general jurisdiction, considered void on account of the death of the defendant having taken place before the rendition of it: that at most it is only voidable. If the death of the defendant will not render a judgment void, no reason is perceived why the death of the plaintiff should have that effect. There being, then, a valid sale under a writ, supported by a judgment not void, the title of Coleman passed by it.

2. The proceedings to set aside the judgment did not affect the respondent, as he was no party to them.

Judge Ryland concurring, the judgment will be affirmed.

GAMBLE, J., not sitting.

JUSTIFICATION OF OFFICERS UNDER THEIR PROCESS: See *McDonald v. Wilkie*, 54 Am. Dec. 423, and note.

DEATH OF PLAINTIFF BEFORE JUDGMENT RENDERED does not affect the validity of an execution sale and sheriff's deed: *Union Bank v. McWharters*, 52 Mo. 35, citing the principal case. *Coleman v. McAnulty* was also regarded as authority on the proposition that the title of such a purchaser was not affected by the death of a defendant against whom execution had issued, between the date of the judgment and that of the execution, where the prop-

erty sold was that of a co-defendant, in *Hardin v. McCause*, 53 Id. 255; and *Lewis v. Coombs*, 60 Id. 44. The principal case was also cited in *Taylor v. Elliott*, 52 Ind. 590, as to the effect of a judgment rendered for or against a deceased person when the court had jurisdiction over such person in his life.

BARNES v. WEBSTER. UNITED STATES, USE OF HAYES, v. FERGUSON.

[16 Missouri, 258.]

ON BREACH OF BOND GIVEN FOR PAYMENT OF MONEY, WITH DEFASANCE
to be void upon the performance of a collateral undertaking, the whole penalty was forfeited and might be recovered in an action on the bond, at the common law; courts of chancery, however, restrain the collection of the penalty and compel the plaintiff to receive such damages as he had actually sustained.

OBLIGEE IN BOND MAY MAINTAIN ACTION FOR BENEFIT OF OTHERS for whose indemnity the bond was given. Consequently the obligee in an attachment bond may maintain an action on it for the benefit of a garnishee when the attachment was dissolved, the suit dismissed, and the garnishee discharged.

ATTACHMENT BOND THOUGH VOLUNTARY AND NOT AUTHORIZED by any statute is good as a common-law bond; all bonds though voluntary, if they do not contravene public policy, nor violate any statute, are valid and binding on the parties to them.

ATTACHMENT BOND EXECUTED TO UNITED STATES IS VALID in a suit between individuals; and in such a case, the acceptance of the bond is presumed although there is no law authorizing the officer to take it.

WEBSTER brought an attachment suit in the United States circuit court against Barnes; and gave a bond conditioned to pay to Barnes or garnishee any damages suffered on account of the suit. One Hayes was summoned as garnishee, and afterwards the attachment was dissolved, the suit dismissed, and Hayes discharged. This action was then brought on the bond by Barnes for the use of Hayes. The declaration did not allege that Barnes had suffered any damage by breach of the bond, and a demurrer by the defendant was sustained for want of this allegation, and on the further grounds that Barnes had no interest in the damages alleged to have been sustained by Hayes, and that neither Hayes nor Barnes could recover damages on the bond in this form of action. The case of *The United States, Use of Hayes, v. Ferguson* turned on similar facts, with the exception that the bond in that case was payable to the United States. Plaintiff brought error.

E. Bates, for the plaintiff in error.

Geyer and Dayton, contra.

By Court, Scott, J. 1. By the common law, when a bond was given for the payment of money, with a defeasance to be void upon the performance of a collateral undertaking, if there was a breach of the condition, the whole penalty was forfeited and might be recovered in an action on the bond. Courts of chancery, however, whose province it was to relieve against forfeitures, would restrain the collection of the penalty and compel the plaintiff to receive such damages as he had actually sustained. The statute of 8 & 9 William III. dispensed with the necessity of resorting to chancery, by requiring the plaintiff to set out the breaches and show the damages occasioned thereby. Judgment was entered for the penalty, and a memorandum was indorsed on the execution, that it might be discharged by the payment of the damages assessed and the costs. The judgment remained, as a security for the future breaches of the condition of the bond, the remedy for which was enforced by *scire facias toties quoties*, until the penalty of the bond was exhausted. This statute extended to those bonds only in which the obligee himself was injured by a breach of the condition. The provision with respect to official and other bonds, by the breach of the condition of which others than the obligee might be injured, was an extension of the terms of the statute of 8 & 9 William III. At common law, if A. covenanted with B. to pay C. a sum of money, B., for the use of C., may maintain an action on this covenant: 3 Ch. Rep.; *Robbins v. Ayers*, 10 Mo. 538 [47 Am. Dec. 125]. Under the equity of the statute, the obligee is regarded as trustee for those who may sustain an injury by the breach of the condition, as it is supposed that the collection of the penalty, which is forfeited by the breach, would, in a court of equity, be restrained only by the payment of the damages sustained by him, for whose use and benefit the bond was given. In the case of *Governor v. Evans*, 2 Dev. 383, it was held that a bond given to a trustee with condition to secure the rights of others may, at common law, be put in suit in the name of the trustee, and an injury to a *cestui que trust* assigned as a breach. That the act authorizing official bonds to be put in suit, by persons injured by the misconduct of the officers, without an assignment, is an affirmation of the common law; and although coroners' bonds are not mentioned in it, they may be sued on in the same manner. To the same

effect is the case of *Skinner v. Phillips*, 4 Mass. 68. This last case is not impugned by that of *The Commonwealth v. Hatch*, 5 Id. 193; for there it appears that the bond was given for the sole use of the commonwealth, and of course no one but her authorized agents could put it in suit. The rights of individuals were not designed to be protected by it, and of course they had no right to sue. The plaintiff is regarded as a trustee for those who may be injured by a breach of the condition; they have a right to use his name in the prosecution of the suit, and as the obligors could only get relief, at common law, by paying the damages actually sustained by the breach, so, on the forfeiture of the penalty, though the plaintiff has sustained only nominal damages, yet the defendant can not be relieved but by the payment of the damages which another may have sustained by breach of the condition of the bond made for his use and benefit. In other words, the plaintiff sues for the benefit of those for whom the bond was given as an indemnity, and the case, if not within the letter, is within the spirit of the law. This determination has not been made without an examination of the cases of *Pickering v. Fisk*, 6 Vt. 104; *Spencer v. Walkins*, 11 Conn. 1; *White v. Wilkins*, 24 Me. 299.

2. It is needless to cite authorities that this bond, although voluntary, and not authorized by any statute, is good as a common-law bond. All bonds, though voluntary, if they do not contravene public policy nor violate any statute, are valid and binding on the parties to them.

3. As regards the case in which the United States is the obligee and plaintiff, we do not see the force of the objections, that a bond to the United States, for the purposes indicated in that one, is not valid, not being executed in pursuance of any law, nor in connection with any business of the United States, or any duty of the obligor to them; and that, no one being authorized to accept the bond, there could be no delivery of it. In the multiplied transactions of the government of the United States, in both the executive and judicial departments, many cases occur in which it is deemed necessary and prudent to take bonds, though there is no statute authorizing them. In all such cases, it is very convenient to make the bonds payable to the United States, as thereby many delays are prevented and intricate questions avoided, which would arise upon bonds payable to individuals or officers, by reason of deaths, successions, etc. The United States are not liable for costs, and no civil can arise from this practice. The process of foreign attachment can

be issued by the circuit courts of the United States, in cases where the defendant is found within the district in which the process issues, so that it can be served upon him. In analogy to the practice which prevails in this state, bonds may be given before the process issues. Such bonds would stand upon the same footing as the bonds in the cases of *The United States v. Tingey*, 5 Pet. 115; *United States v. Bradley*, 10 Id. 343; *Postmaster General v. Rice*, Gilp. 561; *Postmaster General v. Norvell*, Id. 120. In all these cases, the acceptance of the bond was presumed, although there was no law authorizing the officer to take them.

Judge Ryland concurring, the judgment is reversed, and the cause remanded.

GAMBLE, J., not sitting.

SUM STIPULATED TO BE PAID AS LIQUIDATED DAMAGES for breach of covenant, so construed, when: See *Miller v. Elliott*, 50 Am. Dec. 475, and note; see also *Curry v. Larer*, 49 Id. 486, and note; *Mason v. Caldwell*, 48 Id. 330; *Blair v. Perpetual Ins. Co.*, 47 Id. 129.

BOND NOT GOOD AS STATUTORY BOND, GOOD AS COMMON-LAW BOND, WHEN: See *Stephens v. Crawford*, 44 Am. Dec. 680, and note; the principal case was cited to the point that bonds not good as statutory bonds might be good as common-law bonds, in *Williams v. Coleman*, 49 Mo. 325; *Henoch v. Chancy*, 61 Id. 132; *Johnson v. Weatherwax*, 9 Kan. 76; *Sheppard v. Collins*, 12 Iowa, 573.

MORGAN v. RICHARDSON.

[16 Missouri, 409.]

PARTNER HAS NO AUTHORITY TO CONFESS JUDGMENT FOR HIS COPARTNER, either before or after dissolution; and where judgment is so confessed after dissolution by one partner, it will be set aside as against the co-partner, and an execution against him will be quashed.

APPEAL from the Greene circuit court. The opinion states the case.

Leonard, for the appellants.

Hayden, contra.

By Court, Scott, J. This was a proceeding to set aside a judgment and execution thereon, confessed in vacation, in the name of A. and J. M. Richardson, to the appellants, under the twenty-second article of the new code of practice. Achilles and J. M. Richardson were partners in trade, and indebted to the appellants for merchandise. The indebtedness was evidenced by a prom-

issory note, executed in the name of the firm. The confession was authorized by J. M. Richardson alone, and after the dissolution of the partnership between him and Achilles Richardson. The execution was levied on goods belonging to A. Richardson. The court below set aside the judgment against A. Richardson, and quashed the execution.

The facts in this case stand admitted by the demurrer to the petition, and we are at a loss to conceive the ground upon which the proceeding can be sustained against A. Richardson. The case of *Green v. Beals*, 2 Cai. 254, is an authority to show that the judgment confessed by J. M. Richardson was void as to A. Richardson. The cases of *Motteux v. St. Aubin*, 2 W. Black. 1133, and *Denton v. Noyes*, 6 Johns. 298 [5 Am. Dec. 237], are not applicable to the circumstances of this case. It can not be maintained that a partner, either before or after the dissolution of the copartnership, has authority to confess a judgment for his copartner. The authorities are abundant to show that one partner can not confess a judgment which will bind his copartner: *Crane v. French*, 1 Wend. 311; *McBride v. Hagan*, Id. 327. We can see no difference in principle between setting aside the judgment and restraining an execution upon it, as either mode of action is based upon the nullity of the proceeding, which is not permitted to be used as a foundation for any future action against the party for whom it has been unwarrantedly entered.

It does not appear that the judgment against J. M. Richardson has been vacated, nor will we interfere with it. The other judges concurring, the judgment below will be affirmed.

JUDGMENT CONFESSED BY PARTNER, EFFECT OF: See *Bitzur v. Shunk*, 37 Am. Dec. 469; and note to *Wood v. Watkinson*, 44 Id. 570.

MORRISON v. EDGAR.

[16 MISSOURI, 411.]

PURCHASER HOLDING UNDISTURBED AND UNDISPUTED POSSESSION of property under a sale can not, in an action on a promissory note given for the price, set up as a defense that the title to the property was not in the seller at the time of the sale. In such a case there is not properly a failure of consideration so as to allow the consideration to be impeached under the fourteenth section of article five of the statute, regulating the proceedings in justices' courts, which allows the maker of a promissory note to impeach its consideration and show a total or partial failure of the consideration.

PROMISSORY NOTE GIVEN FOR PURCHASE PRICE RESTS UPON SUFFICIENT CONSIDERATION while the purchaser remains in the undisturbed possession of the property sold, although the title to the property is not in the seller at the time, and he has warranted the title to be good in the purchaser, free from all legal claims.

ERROR to the Cooper circuit court. The opinion states the case.

Hayden, for the plaintiff in error.

Adams and Miller, contra.

By Court, GAMBLE, J. Edgar, suing for the use of Brent, commenced his action before a justice of the peace, against Morrison, upon a promissory note for one hundred dollars, which was payable to Brent.

Brent, by his agents, sold certain slaves to Morrison, for nine hundred and fifty dollars, of which eight hundred and fifty dollars was paid in cash, and the present note was given for the balance of the purchase money. At the time of the sale, a bill of sale for the slaves was made, in which a warranty was inserted, by which Brent warranted the "title to said negroes to be good in the said Morrison, his heirs and assigns forever, free from all legal claims whatever."

The justice having given judgment for the plaintiff, the case was brought by appeal to the circuit court, and upon the trial there, the defense was set up by Morrison, that, at the time of the sale, the title to the slaves was not in Brent. It was admitted by Morrison that, ever since the sale, he had had the undisturbed possession of the slaves. The circuit court decided against this defense, and the question now to be considered is, whether it is a valid defense to the suit upon the present note.

Although this note had been assigned by Brent to Edgar, yet it was admitted that, at the commencement of the suit, Edgar was holding it for Brent; consequently, the question is one between Brent, the payee, and Morrison, the maker.

1. There have been many decisions made in the courts of the different states upon questions similar to that arising in the present case, and these decisions are by no means in harmony with each other. In *Frisbee v. Hoffnagle*, 11 Johns. 50, it was held, that the maker of a promissory note, given for the consideration money of land he had purchased, might defend himself against an action upon the note by showing that the payee, who conveyed the land to him, had not the title, although he had never been disturbed in the possession. In *Vibbard v. John-*

son, 19 Id. 77, the case of *Frisbee v. Hoffnagle* was not cited in the argument, nor referred to in the opinion of the court, but Chief Justice Spencer stated the law to be, "that it was not competent for the purchaser to dispute the title of the vendor, unless he had been charged, at the suit of another person, who had, after contestation, shown a better title." The action, in this last case, was to recover the value of a chest of tea, sold by the plaintiff to the defendant, and for which the defendant alleged that he had paid a third person, who was the real owner of the tea, thus bringing up the question whether the plaintiff had any title to the thing sold.

The case of *Frisbee v. Hoffnagle* has been questioned in *Lloyd v. Jewell*, 1 Greenl. 355 [10 Am. Dec. 73], and is understood to be overruled in New York, in several subsequent decisions, as well as by *Vibbard v. Johnson*, *supra*; *Whitney v. Lewis*, 21 Wend. 131; *Lamerson v. Marvin*, 8 Barb. 9.

Although the decisions in other states are not uniform, yet the weight of authority is opposed to the defense attempted in this case, where the purchaser holds the undisturbed and undisputed possession of the property under the sale. The defense is essentially a denial of the consideration of the contract upon which the action is brought, and it is but reasonable that a person who holds the possession of chattels, under a purchase, shall not be allowed to deny the consideration of his promise to pay for them, while his possession is not disturbed.

2. But it is said that the statute regulating the proceedings in justices' courts, in the fourteenth section of article 5, declares a rule by which this defense is admissible. That section authorizes a defendant, who is sued as the obligor in a bond or as a maker of a note, to impeach its consideration and show a partial or total failure of the consideration thereof. It is obvious that the present is not a case properly of a failure of consideration. It is not alleged that anything has occurred, since the sale, by which the relations of the parties to the property sold have been changed or affected. If there was a consideration at the moment of the sale and transfer of the possession, it still exists. The section referred to authorizes a defendant to show, not only that a note was made without consideration, but that a bond, upon which he has been sued, was made without consideration, and it authorizes the defense of a partial or total failure of the consideration, either in case of a bond or a note. Whether the fact relied upon by the defendant, that Brent's title to the slaves was not good, constitutes a defense to

the present note, while the defendant still continues in the possession of the slaves, depends upon the question whether it establishes a want of consideration for the note. The authorities all agree that between the original parties to a note, the want of consideration is an available defense; but if, under this admitted law, a purchaser of property, who holds the undisturbed possession, can not defend himself against his note for the purchase money, on the ground of a want of consideration, because of a defect of title, it is not perceived how the statute has changed the law in this respect. It allows the consideration to be impeached, but it does not change the cases in which there is or is not a sufficient consideration. If the purchase of the property and the continuance of the possession was a sufficient consideration, under the general law previously existing, the statute has not changed the law in such case. This section of the statute, then, does not apply to the present case, nor authorize the defense here attempted.

But it is insisted that the peculiar language of the warranty in the bill of sale binds Brent, not merely to defend the title to the slaves against all opposing claims, but amounts to a covenant of present right and title to the slaves, similar to the covenant of seisin in the conveyance of a tract of land, and that consequently, if he had not title, there was no consideration for the note. If the construction of the instrument contended for was admitted to be correct, the consequence derived from it would not necessarily result. Whatever may be the meaning of the language used in this covenant, the note will still rest upon sufficient consideration while the maker continues in undisturbed possession of the property sold. But it is not thought necessary to dwell upon this view of the case. The particular language of this covenant does not vary its effect from that produced by the ordinary form of covenants of warranty. The seller warrants "the title to the negroes, free from all legal claims," and the use of the words "to be good in the said Morrison," etc., does not change the mode in which the seller is to be held responsible for the existence of a better claim to the property, or in which the superiority of the adverse claim is to be ascertained.

The judgment of the circuit court is, with the concurrence of the other judges, affirmed.

PURCHASER OF GOODS CAN NOT SET UP WANT OF TITLE IN ACTION FOR PRICE by the seller, where there is no fraud and the possession is not disturbed: *Case v. Hall*, 35 Am. Dec. 605; *Sumner v. Gray*, 38 Id. 39.

RICHARDS v. GRIGGS.

[16 Missouri, 416.]

ADMINISTRATOR MAY BE GARNISHED FOR SUM IN HIS HANDS, which, on a settlement, he has been adjudged to pay over.

DEBTOR WHO WITHOUT NOTICE OF ASSIGNMENT OF DEBT PAYS IT TO HIS CREDITOR will be protected as against the latter's assignee.

ADMINISTRATOR GARNISHED FOR SUM OR MONEY he has been ordered to pay over, and suffering judgment to be rendered against him, being ignorant of the fact that it has been assigned from a want of notice of the assignment, will be protected.

APPEAL from the Polk circuit. The opinion states the case.

By Court, Scott, J. This was a proceeding in the nature of a bill of interpleader, begun by the appellant, Richards, against Robert Vermilion, who sues to the use of William Griggs, and against Arrington Simpson. Richards, the appellant, held in his hands, as administrator of L. Richards, the sum of two hundred dollars, which, by an order of the county court of Polk county, he was required to pay to the widow of said Leonard Richards as her dower. Vermilion sued Arrington Simpson and recovered a judgment against him, and no property being found to satisfy the execution on said judgment, Meridy Richards, the appellant, was summoned as a garnishee, on the ground that the widow of L. Richards had assigned to Arrington Simpson the said sum of two hundred dollars, due by the appellant, Richards, to her as dower. These facts appearing, the justice rendered judgment against Richards, the garnishee, for the sum of fifty-four dollars and thirty-nine cents, debt and costs, on which execution issued. Richards, the appellant, then filed a petition praying that Vermilion and Simpson might interplead, and for an injunction. The injunction was granted.

The foregoing are the facts of the case as it appears from the proceedings in the cause. Arrington Simpson states in his answer, that before Richards was garnished at the suit of Vermilion, he had assigned the debt due from Richards to him, by virtue of the transfer of the widow Richards to William and Moses Simpson. It does not appear that Richards, the appellant, had any notice of this fact at the time he was garnished, or at any time afterwards. The court dismissed Richards' bill, from which decree he appealed to this court.

1. In the case of *Curling v. Hyde*, 10 Mo. 375, this court held that no person having his authority from the law, and obliged to execute it according to the rules of law, can be garnished;

that an administrator, therefore, was not subject to the process of garnishment. But in the same case, it was intimated that if, upon a settlement, an administrator had been adjudged to pay a sum of money, it might be garnished in his hands, in a suit against him in whose favor the judgment had been rendered. Indeed, we can see no objection to garnishing an administrator, on a judgment rendered against him. There is no difference in principle between such a judgment and any other. The amount is liquidated; it is payable absolutely, and the arresting of it in his hands can cause no more inconvenience in this than in any other case. After an order on an administrator to pay a demand found due against the estate, it may be regarded as a personal liability, and not distinguishable from one due in his own individual character.

2. Richards, the administrator, had no notice of the alleged assignment to William and Moses Simpson. When debts are assigned which are evidenced by bond, bill, or note, the debtor is never at a loss to know to whom it shall be paid, as he is warranted in taking up the instrument, in whosesoever hands it may be found. But not so with regard to those choses whose existence is not witnessed by any such instrument. Anybody may obtain a copy of a judgment, or may make out an account, and a debtor or trustee pays debts of this character at his peril to any other person than him who is really entitled to them. Hence, the modern English decisions have settled that, in order to constitute a valid assignment of a debt of this kind, notice must be given to the debtor, and if, without such notice, he should pay it to his original creditor, he will be protected in it. Or if, after an assignment, another in good faith should obtain a second assignment for the same thing, and first give notice of his equity, he will be preferred to the first assignee. The amount of the doctrine is, that the bare assignment of such a chose in action does not pass it away without notice of the fact to the debtor, who thereby is informed of the real holder of the debt. If notice of the assignment is not communicated, it enables the original creditor to commit a fraud, as he may assign a second time, and such assignee, although he may take the precaution of inquiring of the debtor, yet he can not ascertain from him the fact of a previous assignment, as it has never been communicated to him: *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, Id. 1; 2 Story's Eq. Jur. 1035 a. Then William and Moses Simpson, according to these principles, had no perfect title to the debt, by virtue of their assignment. In igno-

rance of their rights, the debtor has suffered a judgment to be rendered against him for a portion of the debt, and he will be justified in paying it. Story's *Confl. L.*, sec. 403.

The other judges concurring, the decree below will be affirmed.

RIGHT OF GARNIShee GENERALLY: See *Webb v. Miller*, *ante*, p. 189, and note.

NOTICE OF ASSIGNMENT OF CHOSE IN ACTION: See *Smith v. Blatchford*, 52 Am. Dec. 504, and note.

RIGHTS OF GARNIShee ON PAYMENT OF JUDGMENT: See the note to *Sessions v. Stevens*, 46 Am. Dec. 342.

MILLER v. MARTIN.

[16 Missouri, 508.]

No ACTION LIES FOR INJURY OCCURRING IN PROSECUTION OF LAWFUL ACT, where it results from an inevitable or unavoidable accident without any blame or default on the defendant's part.

ACTION LIES FOR INJURY CAUSED BY WANT OF DUE CAUTION without any regard to the intent with which the injury was done.

If DEFENDANT USES DUE DILIGENCE IN FIRING HIS LAND, and notwithstanding, on account of inevitable accident, the fire escapes and burns the plaintiff's rails, the defendant is not liable.

APPEAL from the Andrew circuit court. The opinion states the case.

Vories, for the appellant.

Leonard, contra.

By Court, Scott, J. This was an action begun in 1847, by Martin, in his life-time, against Miller, for damages. The declaration contained two counts, both at the common law.

It appears that Martin owned a farm about half a mile north of the defendant's, and between them there was an open prairie. The defendant had begun to plow a field, preparatory to the sowing of oats, but in consequence of the quantity of stubble and other such matter upon the ground, he was obliged to desist. In order to remove the obstacles which impeded his plowing, he put fire to them. There had been run, some time before, around the land thus fired, furrows making the width of a rod. The defendant and a servant boy remained to watch the fire. The wind rose high about the middle of the day, although it was calm in the morning. In the absence of the boy, who had gone for a drink of water, the fire escaped and was communicated to the plaintiff's fencing, and burned a quantity of his rails. The

court refused an instruction asked by the defendant, to the purport, that, if he had used due diligence in firing his land, and, notwithstanding, the fire had escaped and burned the plaintiff's rails, without the least fault or neglect on his part, they will find against the plaintiff. And, at the instance of the plaintiff, instructed the jury, that if the defendant himself, or by another, set out fire which ran to and communicated with and burned the fence of the plaintiff, they will find for him. Otherwise they will find for the defendant. There was a verdict for the plaintiff, and after an unsuccessful motion for a new trial, the cause was brought to this court by appeal.

Some confusion was produced in the argument of this cause, by reading cases in which the only point involved was the form of the action for the injury committed; whether it should be trespass *vi et armis*, or an action on the case. The propriety of the application of the principle, whose aid is sought to shield the defendant from damages for the act complained of, does not depend on the circumstance whether the injury was direct or consequential; it is equally applicable, whether the remedy for the alleged wrong is trespass or case. It is conceded that this is an action at common law, uninfluenced by any statutory provision.

1. It must be acknowledged that it is a settled principle of our law that, if a party be in the prosecution of a lawful act, an action does not lie for an injury resulting from an inevitable or unavoidable accident which occurs without any blame or default on his part. One of the earliest cases on this subject is that of *Weaver v. Ward*, Hob. 134. Two companies of trained soldiers were skirmishing for exercise, and a soldier of one company, in firing his piece, wounded a soldier of the other company. On demurrer to declaration in trespass for this injury, the court gave judgment for the plaintiff, but declared it would have been otherwise if it had been utterly without the defendant's fault, as if the plaintiff had run across his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt. This doctrine is recognized in the subsequent cases, and although difficulties have arisen in its application, its correctness has never been contested: Chit. Pl. 149; *Wakeman v. Robinson*, 8 Eng. Com. L. 478; *Davis v. Saunders*, 18 Id. 825. The cases cited by the plaintiff do not, as we conceive, impugn the principle above stated. That of

McAllister v. Hammond, 6 Cow. 342, is put expressly on the ground of negligence, and the real point involved was whether the remedy should have been trespass or case. The same remark is applicable to the case of *Hodges v. Weltberger*, 6 T. B. Mon. 337. The case of *Amick v. O'Hara*, 6 Blackf. 258, was for chasing a horse out of a field with a large fierce dog, by which the horse was injured, though not by the dog. The question of intent was considered in this case. For an injury caused by the want of due caution, there is no doubt that a party will be liable to an action, without any regard to the intent with which the injury was done. It may have been entirely unintentional and against his will, and a source of mortification, regret, or sorrow; yet, if it is caused by negligence, the party will be liable to an action. Whether that action should be trespass or case, will depend on the circumstances attending the commission of the act, and is a matter of indifference in the application of the principle involved in this case. The case of *Sheridan v. Bean*, 8 Met. 284 [41 Am. Dec. 507], was an action for a trespass committed by cattle which had escaped from their inclosure. As by the law of Massachusetts the owner of cattle is obliged to confine them, so that they can not trespass on the grounds of others, the foundation of the action must have been the negligence of the owner of the cattle, or of those to whose care they were intrusted.

The case of *Guille v. Swan*, 19 Johns. 381 [10 Am. Dec. 234], was an action against an aeronaut for an injury done to a garden by the crowd which was attracted to the balloon at its descent. The court said that although the ascending in a balloon is not an unlawful act, yet it is certain that the aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard, and he did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity or for the purpose of rescuing him from a perilous situation, all this must have been foreseen by him, and he must be responsible for it. The case of *Newson v. Anderson*, 2 Ired. L. 42 [37 Am. Dec. 406], December term, 1841, merely determines that if the owner of land adjoining that of another fells a tree standing on his own land, which falls on the land of the adjoining proprietor, he is guilty of a trespass. The paragraphs referred to in Greenleaf all relate to the distinc-

tion between actions of trespass and case. But, in the same book, sections 85 and 94 clearly maintain the principle above stated. It is there said the plaintiff must come prepared with evidence to show either that the intention was unlawful or that the defendant was in fault; for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be liable. Thus, if one intend to do a lawful act, as to assist a drunken man, or prevent him going without help, and in so doing a hurt arise, it is no battery. So if a horse, by a sudden fright, runs away with his rider, not being accustomed so to do, and runs against a man; or if a soldier, in discharging his musket, by lawful military command, unavoidably hurts another, it is no battery; and in such cases the defense may be under the general issue. But to make out a defense under this plea, it must be shown that the defendant was free from all blame, and that the accident resulted entirely from superior agency. Thus, if one of two persons fighting unintentionally strikes a third; or if one uncocks a gun without elevating the muzzle or other due precaution, and it accidentally goes off and hurts a looker-on; or if he drives a horse too spirited, or pulls the wrong rein, or uses a defective harness, and the horse, taking fright, injures another, he is liable for the battery. But if the injury happened by unavoidable accident, in the course of an amicable wrestling or other lawful athletic sport, if it be not dangerous, it may be justified. If it were in a boxing-match or fight, though by consent, it is an unjustifiable battery, the proof of consent being admissible only in mitigation of damages. The last case we will notice on this head is that of *Hay v. The Cohoes Co.*, 2 N. Y. 159 [51 Am. Dec. 279]. The defendants, a corporation, in digging a canal upon their own land, for purposes authorized by their charter, found it necessary to blast rocks with gunpowder, and in doing so, the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. Under these circumstances, it was held that the defendants were liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. The case now under consideration is not parallel with the one cited, which rather resembles the case of *Gregory v. Piper*, 17 Eng. Com. L. 266. A master ordered a servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same. The servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall. It was held that

the master was liable in trespass. Judge Parke, in delivering the opinion of the court, observed that "the defendant must be taken to have contemplated all the probable consequences of the act which he had ordered to be done, and one of those probable consequences was that the rubbish would touch the plaintiff's wall." The case is also analogous in principle to that before cited, relative to the aeronaut who ascended in the balloon. The scattering of the fragments of rock in all directions, beyond the control of the party, was a natural consequence of the blasting, and must have been foreseen as probable. The rise of the wind, in the case under consideration, was not a natural or probable consequence of setting fire to the stubble, and could not have been foreseen, though such an accident was possible, and great fires may cause the wind to rise.

The case of *Turbervil v. Stamp*, 1 Salk. 13, was for negligently keeping fire in a close, whereby the plaintiff's grass was consumed. After verdict for the plaintiff, it was objected that the party was liable only by the custom of the realm for fire in his house or curtilage, which are in his power. But the objection was disallowed; for the fire in his field is his fire as well as that in his house, and he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen, which he could not stop, it was matter of evidence, and he should have shown it.

The custom or law referred to in the above case was repealed by statute of 6 Anne, c. 31, which enacts "that no action shall be maintained against any one in whose house or chamber any fire shall accidentally begin."

2. No question was raised in the court below as to the stubble being set on fire on Sunday.

The other judges concurring, the judgment will be reversed and the cause remanded.

PERSONS ENGAGED IN LAWFUL ACT ARE NOT LIABLE FOR ACCIDENTAL INJURY occurring during the performance of the act, when ordinary care and caution have been exercised: *Williams v. M. C. R. R. Co.*, 55 Am. Dec. 59.

DAMAGES CAUSED BY SETTING FIRE ON ONE'S LAND: See note to *Radcliffe v. Mayor etc. of Brooklyn*, 53 Am. Dec. 370; *De France v. Spencer*, 52 Id. 533, and note. The principal case was cited to the point that in such a case the question whether the loss was the direct or natural result of the negligent act should be submitted to the jury under proper instructions, in *Clemens v. H. & St. J. R. R. Co.*, 53 Mo. 370.

GROVES' HEIRS v. FULSOME.

[16 MISSOURI, 543.]

MARRIED WOMAN HAS NO RIGHT OF PRE-EMPTION when her husband was alive, and had for a valuable consideration sold the improvements erected on the claim, to another, under whom the wife claimed.

MARRIED WOMAN OBTAINING PATENT FROM GOVERNMENT WILL BE REGARDED AS TRUSTEE of one who had entered the land, and finding her in possession without any claim to a right of pre-emption, had paid her for her improvements, and for yielding possession to his vendee, if with the money thus obtained she entered a claim of pre-emption, and obtained the patent.

ONE OBTAINING PATENT TO LAND BY FRAUD towards another, or who affects himself with a trust, holds the title thus acquired for the benefit of those who have been injured by his conduct.

FRAUDS AND TRUSTS ARE NOT WITHIN STATUTE OF FRAUDS.

EVIDENCE OFFERED IN SUPPORT OF ALLEGATIONS IN BILL SHOULD BE RECEIVED, where it tends to prove the case made out in the bill, and the bill contains equity.

APPEAL from the Crawford circuit court. The opinion states the case.

Johnson, for the appellants.

Frissell, contra.

By Court, Scott, J. This was a suit in chancery, begun by Ezekiel Groves (who, dying, was replaced by his heirs), against Jesse Fulsome, John Propste, and others. The bill states that in May, 1836, E. Groves entered the tract of land which is the subject of this controversy, containing eighty acres, at the land office in the Jackson district. In February, 1837, Groves agreed to convey the land to E. Wilson, and bound himself in a penalty to make a title on or before March 1, 1840. At the date of this agreement, Susannah Fulsome lived on the land, which had some improvements upon it. Groves and Wilson, wishing to avoid difficulties, and being unwilling to take the land without paying for the improvements, proposed to Mrs. Fulsome to give her fifty dollars for her improvements, or the sum at which they should be valued by two disinterested men. She preferred the first branch of the proposition, received the sum offered, and voluntarily yielded possession to Wilson. During the latter part of the year 1837, Mrs. Fulsome made application to prove a right of pre-emption to the land, and Groves was notified to attend, which he accordingly did, but the matter was postponed indefinitely, and afterwards, in February, 1838, without any notice to him, Mrs. Fulsome was permitted to enter the land,

under the claim of a right of pre-emption, and obtained a patent for the same. Upon this, in 1843, the administrator of Wilson, who had in the mean time died, began a suit against Groves, on his bond for a title, and recovered the purchase money with interest. In February, 1838, Mrs. Fulsome conveyed the land to John Propste, her brother, and in 1847 Propste conveyed it to Jesse Fulsome, a son of Mrs. Fulsome. In 1848, Mrs. Fulsome died, leaving three children, Jesse, Malinda, and Jane. The bill states that Propste was fully apprised of the conduct of his sister, and guided her by his counsel, and assisted her with his means; and that, at the time of the conveyance to Jesse Fulsome, he had full knowledge of all the circumstances under which his mother's title was obtained. Fulsome and Propste relied on the statute of frauds, and in their answers deny all notice, and insist that they were purchasers for a valuable consideration.

On the trial, the evidence of several witnesses was offered in support of the allegations of the bill; also, that E. Fulsome, the husband of Mrs. Fulsome, went to the south in 1835, with horses, and has never returned. Before his departure, he pledged the tract of land in dispute to James Benton, who afterwards sold it at public sale about the time it was entered by Groves, with an understanding that, if he had entered it, the contract should be rescinded; that Mrs. Fulsome was apprised of the sale, and was asked if she had any right of pre-emption to the land. She answered that she had not, that her husband had sold his improvements to Benton, and that she was permitted to live on the place by his kindness and indulgence. Evidence was also offered tending to show in Propste a knowledge of the circumstances of this transaction, all of which was excluded, to which an exception was taken. There was a decree dismissing the bill, and the complainants appealed to this court.

1. It does not appear from anything in the cause under what law of congress Mrs. Fulsome claimed the right of pre-emption, which she was permitted to prove up in the month of February, 1838. The assertion in one of the answers, that she was entitled under an act passed in 1820, is evidently a gross error. It must have been under the act of May 29, 1830, or some of the acts supplementary thereto. If under any of these enactments, her right had no foundation in law, and an act of great injustice was done to Groves, who had previously entered the land, by Mrs. Fulsome, in entering the same under the claim of a right of pre-emption. The provision of the law of

congress, prohibiting a sale of the right of pre-emption, had no application to this case.

2. Mrs. Fulsome had no right of pre-emption. She was not the head of a family, as her husband was alive, and had, for a valuable consideration, sold the improvements to another, under whom she claimed, as she admitted. From the evidence in the case it is clear that the entry of Groves was lawful, as no right of pre-emption existed at the time it was made. But if the law was violated, Groves had no hand in it. The improvements were purchased by Benton from Fulsome, and Groves does not claim under Benton. Groves, then, finding Mrs. Fulsome in possession, without any claim to a right of pre-emption, gave her fifty dollars to yield to his vendee that possession. With the money thus obtained she entered the land, the possession of which she had voluntarily given up, under the color of a pre-emption, to which she declared she had no right. We can not but regard this conduct on her part as a fraud on Groves, and the right she acquired by such means must be clothed with a trust for the benefit of Groves.

3. While we are aware that we can not interfere with the primary disposition of the soil by the general government, yet our courts must not permit citizens of this state, owing obedience and subjection to her laws, under the protection of this principle, to trample under foot the laws securing the observance of good faith in the transactions between man and man. Hence our courts have held that, although one may obtain from the United States the legal title to a tract of land, yet if in so doing he is guilty of a fraud towards another, or affects himself with a trust, he shall hold the title thus acquired for the benefit of those who have been injured by his conduct: *Stephenson v. Smith*, 7 Mo. 610. In yielding her possession to Groves' vendee for a valuable consideration, Mrs. Fulsome impliedly undertook not to interfere with his rights. It is a fraud for a settler on the public lands to sell his improvements and with the money go and enter from his vendee the very land which he had been paid to yield up. It is not acting in good faith towards him from whom the purchase money was received. It is true the purchaser ought to have known that the land might have been taken from him at any time, but he could not expect such conduct from him to whom he had paid a valuable consideration for the right of occupancy. It is better that the sale of a tract of land should be delayed a little while than that such frauds should be tolerated. The present case is stronger than any of

those supposed. Groves had entered his land, and to avoid difficulties and the imputation of acting harshly in depriving another of her improvement without compensation, he paid for it. The occupant afterwards, with this very money, enters the same land under color of a pre-emption, to which she had no claim in law. Under such circumstances, she must be regarded as a trustee for the benefit of Groves.

4. It is obvious that the statute of frauds has no application in this cause. That statute has never been perverted to the protection of fraud. It is well settled that frauds and trusts are not within the provisions of the statute.

Groves can only have a decree on the payment of the purchase money advanced by Mrs. Fulsome, as it is presumed that he has or may withdraw from the land office the money he paid when he entered the land.

5. The court rejected all the evidence offered by the complainants. Such a course is rather unusual. The evidence certainly tended to prove the case made out in the bill, and so long as the bill was regarded as containing equity, the evidence offered in support of its allegations should have been received. From the course of the proceeding it would appear that a demurrer should have been filed to the bill. To let the bill stand, and yet to refuse any evidence to maintain it, seems rather an incongruity. The complainant, after the rejection of all his evidence, was under no obligation to go further, and offer proof of the fraud in Jesse Fulsome.

The other judges concurring, the decree will be reversed and the cause remanded.

PATENTEE OF LAND CONSIDERED TRUSTEE, WHEN: See *Lewis v. Lewis*, 43 Am. Dec. 540, and note.

TRUSTS AND FRAUDS ARE NOT WITHIN STATUTE OF FRAUDS. The language of the principal case on this point was quoted in *Damschroeder v. Thras* 51 Mo. 103, with approval. Trusts in personality are not within the statute of frauds: *Kimball v. Morton*, 43 Am. Dec. 621, and note.

THE PRINCIPAL CASE WAS CITED in *Peacock v. Nelson*, 50 Mo. 261, on the point that one obtaining a conveyance of lands merely to act as agent for the sale of them could not hold them for himself, and if he attempted to do so a trust grew up in favor of the grantor by implication, which equity would compel him to execute.

RECTOR v. WAUGH.

[17 MISSOURI, 13.]

REMEDY BY ANCIENT WARRANTY never had any practical existence in the United States.

COMMON LAW IMPLIED NO WARRANTY WHEN PARTITION WAS MADE between joint tenants and tenants in common.

DURATION OF WARRANTY IS CO-EXTENSIVE ONLY WITH ESTATE to which it is annexed; and on a conveyance of an estate for life with warranty, the warranty becomes extinct on the death of the grantee.

DOCTRINE THAT OUTSTANDING TITLE BOUGHT IN BY ONE TENANT IN COMMON INJURES TO BENEFIT of his co-tenants is one of equitable cognizance, and courts of equity apply it so as to do justice among the tenants.

WORD "HEIRS" IN DEED IS NECESSARY TO CREATE ESTATE IN FEE SIMPLE. CONVEYANCES BETWEEN TENANTS IN COMMON MUST CONTAIN WORDS OF

PERPETUITY to pass a fee, as one tenant in common can not convey to another in any other way, or by a conveyance whose operation is different from those used by feoffors between whom no such relationship exists; and if no words of perpetuity are used an estate for life merely passes.

ON CONVEYANCE BETWEEN CO-TENANTS WITH WARRANTY, the warranty continues during the life of the grantee only if the deed contained no word of perpetuity; and if the title of the co-tenants proves to be bad, and subsequent to the conveyance the co-tenants making it obtain title to the land, this title will not, by virtue of the warranty, inure to the benefit of the grantee's heirs.

ERROR to the Marion circuit court. The opinion states the case.

Glover and Campbell, and Buckner, for the plaintiffs in error.

Abiel Leonard, Richmond and Lakenan, contra.

By Court, Scott, J. This was an action of ejectment, begun in March, 1848, to recover possession of a lot of ground in the city of Hannibal, in this state. The plaintiffs in error, who were also plaintiffs below, based their right of recovery upon the following deed: "This list and instrument of writing is to make known to all whom it may concern, that, after the sales of lots in the town of Hannibal (of a part thirty-two squares, which were laid off), the sales of which have been examined by each of the proprietors, this day an equal division of the remaining unsold lots of said thirty-two squares or blocks was equally made, according to the different interests in said town property, and we, the said proprietors, do hereby relinquish to Stephen Rector (one of the proprietors), the lots marked and numbered in the columns to the left [here follows a list of the lots conveyed by the deed, including lot No. 7, in block No. 31, the lot in controversy], each lot to be sixty-five and a half feet front,

by one hundred and forty-two feet back. To have and to hold the same forever, and we furthermore warrant and defend said lots against the claim or claims of all and every person whatsoever. Should there be surveyed out at any future time more lots in the town tract (first located by Thompson Bird, Elias Rector, Thomas C. Rector, and Laban Glasscock), the same will rest as an undivided property belonging to the present proprietors. In testimony whereof, and of the whole of the foregoing agreement, we, the proprietors of Hannibal, have hereunto set our hands and seals the day and date above written. R. Gentry [seal], Thos. C. Rector [seal], Wm. V. Rector [seal], Stephen Rector [seal], M. D. Bates [seal], for Th'n Bird."

This deed was acknowledged by the parties, in St. Louis county, before a justice of the peace, on the seventeenth of April, 1819, but was never recorded. In columns on the left-hand margin of the paper on which the deed was written there was a list containing a description of the lots by number, and the various blocks in which they were situated. The plaintiffs were the widow and child of Stephen Rector, named in the foregoing deed as the grantee. The lot in controversy is parcel of a tract of land owned by Abram Bird, sen., who authorized his son, Thompson Bird, by power of attorney, to dispose of it. A patent for the tract of land containing 640 acres was issued to A. Bird, in 1824. He died in 1821, leaving a wife and five children, of whom Thompson Bird was one. Under his power of attorney, Thompson Bird conveyed one half the tract of land to Elias Rector, and one eighth to M. D. Bates. Elias Rector afterwards conveyed his interest to the above-named persons, R. Gentry, Thomas C. Rector, William V. Rector, and Stephen Rector. Under the direction of these last-named individuals and Thompson Bird, M. D. Bates laid off the town of Hannibal, and the proprietors made a public sale of lots in 1819, and afterwards, in the same year, a division of the remaining lots took place among the proprietors, who executed mutual deeds of partition with covenants of warranty. The deed above recited is one of the several deeds which were executed in consummation of the agreement among the several proprietors. It was afterwards discovered that the power of attorney, under which Thompson Bird acted, was defective, and the representatives of Elias Rector, in a suit, recovered back the purchase money for the land which Bird had conveyed to him, and which he had conveyed to the above-named proprietors, R. Gentry, T. C. Rector, William V. Rector, and Stephen Rector. The title under

which the town was laid off and the partition among the proprietors was made thus having failed, Thompson Bird, M. D. Bates, and William V. Rector subsequently acquired a new title to the land on which the town was laid off; and this suit is brought on the warranty contained in the deed above recited to Stephen Rector, on the ground that the subsequently acquired title passed by estoppel to Stephen Rector and those claiming under him, as against Thompson Bird, M. D. Bates, and W. V. Rector, and those claiming under them.

On the case made, the court below instructed the jury that the plaintiffs were not entitled to recover.

It was contended for the plaintiffs that those claiming under Bird, Bates, and W. V. Rector are estopped, by the warranty contained in their deed of partition to Stephen Rector, from denying the right to the premises in controversy of Stephen Rector and those claiming under him, and that the title subsequently acquired by Bird, Bates, and W. V. Rector inured, by virtue of the warranty, to Stephen Rector, and his heirs and assigns, or that the estoppel created by the warranty operated to pass the after-acquired estate, and will therefore sustain an ejectment.

For the defendant, it was maintained that the personal covenant of warranty used in our system of conveyancing is not identical with the warranty real of the common law, the one being essentially different from the other; that if, however, the personal covenant is to be considered identical in its operation with the real warranty of the ancient law, yet the effect of passing an after-acquired estate, in all cases, was never imputed by that law to the real warranty; that the effect of a real warranty was to oblige the warrantor to defend the estate to which it was annexed, and was used either for defense or redress: for defense by way of rebutter or estoppel against the grantor, and for redress by way of voucher or *warrantia chartæ*, when the warrantee was sued for the land warranted; that to make a warranty operate by way of rebutter, or to constitute a bar, the estate to be barred must have been divested or turned to a right at the time or before the warranty was made, and must have been a continuing estate at the time it claimed the protection of the warranty.

1. It is the received opinion of the profession that the remedy by the ancient warranty never had any practical existence in the United States. Chancellor Kent says that the ancient remedy on the warranty is inadequate and inexpedient, and has

become entirely obsolete: 4 Kent's Com. 472. The principles maintained by the plaintiffs prevail in many states where modes of alienation exist similar to our own, and although they may not harmonize with some rules of the ancient common law, whose utility and importance are not so readily perceived as formerly, yet they seem now supported by too great weight of authority, and have too long prevailed, to be disregarded with safety to titles. No question of this kind has arisen in our courts independent of our statute, and it has been suggested that we are at liberty to take a course that will harmonize with the ancient law. Although the question may not have arisen here, yet we know that the profession in this state is mostly composed of those who have been educated in other states, and in the absence of opposing statutes, they have naturally enough conceived that our courts would take the law as it is understood in our sister states. This consideration should restrain us from entering on any new course in relation to this subject. The strong views presented by the counsel for the defendant are supported by a great weight of authority, but the reasoning on which they are founded has been insensibly undermined, and principles which stood out in bold relief when the feudal policy was the idol of the law have gradually lost their force. Our statute allowing the conveyance of lands whilst in the adverse possession of another has overturned many of the rules of the ancient law of alienations: Smith L. C., with Am. notes, 459-463; *Pike v. Galvin*, 29 Me. 183. As the opinion of the court will turn on another point in the case, without going into an examination of the authorities in support of the views advanced by the plaintiffs to sustain their action on the estoppel created by the warranty in the deed of partition, we will proceed to state the grounds on which our judgment is based.

2. It can not escape observation that the doctrine of estoppel, as applied in this case, is very harsh in its operation. A number of proprietors of a town, supposing that they have a title to the land on which the town is laid off, make an equal partition of the lots amongst themselves, and mutually convey with warranty. The entire title to the land which is the subject of partition afterwards fails. If the matter ended here, it would not be maintained that any one of the proprietors had a cause of action against the others, as what he recovered on his warranty he in turn would be compelled to refund to him from whom he had recovered on the warranty he had given. The different warranties would compensate each other, and it

would be useless to sue, as each party in the end would be in the situation in which he was before suit was brought. The parties would be all even, and there would be no obligation, in law or morality, resting on one to indemnify another. After the failure of the first title, one or more of the proprietors acquire a new and distinct title to the land on which the town was laid off, and a former proprietor, who has neither contributed nor offered to contribute anything towards the acquisition of the new title, lays claim to all the lots conveyed to him by the deed of partition. The common law implied no warranty when partition was made between joint tenants and tenants in common. Indeed, by the common law, partition was not compellable among them. The warranty was only implied on partition among coparceners, and only extended to the land which was the subject of the partition. The doctrine which makes an outstanding title, bought in by one joint tenant or tenant in common, inure to the benefit of his co-tenants, it seems, is one of equitable cognizance, and courts of equity would mold and apply it so as to do justice among the tenants: *Van Horne v. Fonda*, 5 Johns. Ch. 388.

The fact that Waugh appears on the record as a trespasser does not affect the merits of this question. This suit is maintained and defended with a view to settle the rights of the different claimants to the lot in controversy, and he must be regarded as the representative of those who purchased the new title, and a decision against him in the case as presented will bar their rights. Nor do we consider it as affected by the fact that Bates and Bird, in their subsequent conveyances, indemnified themselves against the claim of those with whom they had formerly made partition. The principle on which the action is sought to be maintained is unaffected by these circumstances, is one of dry and technical law, and when applied to the facts of this case has nothing to commend it. We feel no reluctance in answering a technical action with a technical objection.

3. In the deed on which this action is founded, there are no words of perpetuity used in conveying the estate to Stephen Rector. According to the law in force at that day, the words employed only conveyed a life estate, and the duration of the warranty is only co-extensive with the estate to which it was annexed. The warranty, then, was extinct on the death of Stephen Rector. In 4 Kent's Com. 5, it is said the word "heirs" is necessary at common law to create by deed an estate in fee simple. Further on he says that this rule does not apply to a

partition between joint tenants, coparceners, and tenants in common, nor to releases of right to land, by way of discharging or passing the right, by one joint tenant or coparcener to another. In taking a distinct interest in this separate parcel of the land, the releasee takes the like estate in quantity, which he had before in common. This is a question in which the matter of intent has nothing to do. The law has appropriated a certain word by which an estate in fee simple can only be created by deed. If that word is omitted, however clear and manifest the intent may be, an estate in fee will not pass. It is conceded that as between joint tenants and coparceners, a fee may pass by a release without the word "heirs," but it is apprehended that one tenant in common can not release to another. A deed intended as a release between tenants in common, although it can not have that effect, may yet operate as some other kind of conveyance; but to make it effectual as such to pass a fee, proper words of limitation must be employed. Cruise says one tenant in common can not release to his companion, because they have distinct freeholds, but they must pass their estates by feoffment: 4 Cru., tit. 32, c. 6, sec. 25. So he says if one coparcener or joint tenant releases all his right to another, it will pass a fee without the word "heirs:" Id., c. 21, sec. 7. Lomax says that partition between tenants in common, who having several and distinct freeholds might have conveyed to each other by feoffment, might, at common law, have been effected by livery of seisin. The adjustment between them in severalty of the estate, derived to them in common by distinct titles, could only be effectuated by a conveyance, accompanied by that notoriety indispensable to all conveyances at common law: 2 Lomax Dig. 96. So again, one tenant in common can not release to his companion, because they have distinct freeholds; but they must pass their estates by feoffment: Id. 98. Preston on Abstracts says, when several persons are tenants in common, the title to each share is to be carried on precisely in the same manner as if the title to that share was a title to a distinct farm: 3 Pres. Abs. 48. Hilliard says joint tenants and coparceners may release to each other. In a release of this kind, a fee will pass without words of limitation. The releasee is deemed in law to hold, not by the release, but by the original limitation to all the parties. The release is not an alienation, but a mere discharge of the claims of one to the other. Hence a fee arises out of the original conveyance. Tenants in common, having distinct freeholds, can not release to each other: 2 Id. 300, 301. Bacon says, if there be two joints tenants

and one release to the other, this passeth a fee without the word "heirs," because it refers to the whole fee, which they jointly took and are possessed of by force of the first conveyance. But tenants in common can not release to each other, for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which they can not transfer otherwise than as persons who are sole seised: 4 Bac. Abr. 455. The books may be traced to the earliest periods, and it will be found that no author has maintained that one tenant in common can convey to another in any other way or by a conveyance whose operation is different from those used by feoffers, between whom no such relationship exists. It follows from this, that however conveyances between tenants in common may operate, and they can not operate by way of release, they must contain words of perpetuity to pass a fee.

Other exceptions were taken to the deed on which the plaintiffs rely for a recovery, but it is not deemed necessary to give any opinion respecting them, as the judgment will be affirmed for the reason already given. The other judges concur.

AFTER-ACQUIRED TITLE PASSES BY CONVEYANCE WITH WARRANTY, WHEN AND WHEN NOT: See *Partridge v. Patten*, 54 Am. Dec. 633, and note.

COVENANT OF WARRANTY IN INSTRUMENT OF CONVEYANCE VOID FOR WORDS OF GRANT, EFFECT OF: See *Brown v. Manter*, 53 Am. Dec. 223.

IMPLIED WARRANTY ARISING ON PARTITION: See *Sawyers v. Cator*, 47 Am. Dec. 608, and note; see also note to *Crouch v. Fowle*, 32 Id. 355.

ANCIENT COVENANT OF WARRANTY IS OBSOLETE: See *Rose v. Turner*, 44 Am. Dec. 531, and note.

TECHNICAL WORDS IN DEED, NECESSITY OF: See note to *Davenport v. Wynne*, 44 Am. Dec. 73; *Gambril v. Doe d. Rose*, Id. 780; *Brown v. Manter*, 53 Id. 223; *Leitenedorfer v. Delphy*, 55 Id. 137.

DRAPER v. BRYSON.

[17 MISSOURI, 71.]

PURCHASEE AT SHERIFF'S SALE IS NOT AFFECTED BY ANY ERROR OR IRREGULARITY in the judgment or other proceedings, unless it is of a character to render the whole proceeding a nullity.

OBJECTION THAT SERVICE OF SCIRE FACIAS TO REVIVE JUDGMENT WAS VOID, because, instead of having a sheriff's return of service upon it, it had an acknowledgment signed by the administrator, that it was personally served upon him, and that consequently the judgment was a nullity, can not be made so as to defeat an action of ejectment brought by a purchaser on execution under the judgment.

FAILURE OF SHERIFF TO GIVE NOTICE REQUIRED BY STATUTE OF SALE does not affect the title of a *bona fide* purchaser, as the purchaser is not affected by any irregularities in the sheriff's proceedings in making a sale under execution, unless he has participated in occasioning it, or there has been some departure from the law for some fraudulent purpose.

STATUTE FIXES DATE OF DEED, and not the date of its acknowledgment, as the commencement of the three months within which it is to be recorded.

SUBSEQUENT GRANTEE CAN NOT DISPUTE PRIOR GRANTEE'S DEED FOR HIS FAILURE TO RECORD it within the time prescribed by statute, where his own deed has not been recorded within the statutory time; and the prior purchaser takes the better title if his deed is first recorded.

CERTIFICATE OF ACKNOWLEDGMENT IS OF NO VALUE AS TO FACT STATED IN it if the law did not intrust the officer to certify to this fact.

UNRECORDED DEED PREVAILS IN LAW OVER TITLE OF SUBSEQUENT PURCHASER with notice of the deed.

EJECTMENT. The opinion states the case.

A. H. Buckner, for the plaintiff in error.

Broadhead, Glover, and Campbell, contra

By Court, GAMBLE, J. In this case, the plaintiffs below (Drapers) rely upon two titles for undivided portions of the premises for which this action of ejectment was brought. Shaw and Caldwell were originally joint owners of the lot, and the plaintiffs claim through Block, who, it is alleged, obtained the title of Shaw by a purchase at sheriff's sale in December, 1823, and the title of Caldwell by a purchase at coroner's sale in April, 1824. It is seen by the statement that the defendants, Bryson and others, claim under a deed made by Caldwell for himself, and as attorney for the heirs of Shaw, on the fourteenth of May, 1821, acknowledged July 16th of that year, but not recorded until the third of August, 1824. The sheriff's deed to Block for Shaw's interest is dated December 10, 1823, and is acknowledged and recorded on the next day. The coroner's deed to Block for Caldwell's interest is dated May 14, 1824, and is acknowledged and recorded on the tenth of August following. These two last deeds were executed between the date of the deed to Bryson, in 1821, and its record, on the third of August, 1824; but the coroner's deed to Block was recorded August 10th, being seven days after the record of Bryson's deed. It will be seen by referring to the instruction given by the court, on the request of the defendant (which is called the third instruction, although it is the first in the series asked), that the title claimed by the plaintiffs under the sheriff's deed for Shaw's interest was

excluded from consideration, as the court declared that the judgment and sheriff's sale were void, because the court had not obtained jurisdiction over Shaw's administrator when the judgment was rendered. It will be further seen, by referring to the first instruction given at the request of the plaintiffs, that the deed to Bryson, dated in May, 1821, and not recorded till August, 1824, is declared void against the sheriff's and coroner's deeds to Block, although the coroner's deed is dated in April, 1824, and not recorded until August 10th, afterwards. The instruction given for the defendants, numbered as the eighth, gives full effect to the unrecorded deed to Bryson against both of Block's deeds, if Block, at the time of his several purchases, had notice that the lot had been sold to Bryson. The court found for the plaintiffs for an undivided half of the premises. This finding, under the law declared by the court, must have been for the title conveyed to Block by the coroner's deed for Caldwell's interest, as the sheriff's deed for Shaw's interest was declared inoperative, and it must further have negatived all notice to Block of Bryson's title at the time of this coroner's sale.

As both parties have taken exceptions and writs of error, the questions decided against each, so far as they are material to the settlement of the controversy, will be considered.

1. The exclusion of the sheriff's deed for Shaw's title will be examined first. The objection sustained by the court was, that the judgment against John Shaw, administrator of Joel Shaw, was void, because the *scire facias*, which issued to revive the suit against the administrator, John Shaw, instead of having a sheriff's return of service upon it, had an acknowledgment signed by the administrator, that it was personally served upon him, and the court afterwards rendered a judgment by default. This is the force of the objection, as sustained in the instruction given for the defendants; for the exclusion of the sheriff's deed was put upon the ground that the court had not obtained jurisdiction over the administrator when the judgment was rendered. It is apparent that the court that rendered the judgment against Shaw's administrator acted upon the acknowledgment of service by the administrator as equivalent to a return by the sheriff, and was, no doubt, satisfied that the administrator had signed the acknowledgment, although the entry of the judgment by default does not show that fact. I do not find any statute prescribing the mode of serving a *scire facias* to revive a suit against an administrator *de bonis non*, at the time this writ was issued.

The act of 1807, in its eleventh section, 1 Terr. Laws, 110, provides for a *scire facias* to bring in the administrator of the original defendant, who may have died pending the action, and it declares, that if the administrator, being duly served with a *scire facias* from the office of the clerk, twenty days beforehand, shall neglect to become a party to the suit, the court may render judgment against the estate of the deceased. By the English law, the sheriff would return on the *scire facias* either "that he had given notice to the defendants," or "that they have nothing by which he can make known to them:" Tidd's Pr. 1038.

In the present case, there is no actual return under the hand of the sheriff. In *Norwood v. Riddle*, 1 Ala. 195, error was prosecuted to reverse a judgment by default, where there was no return by the sheriff, but where there was an indorsement upon the writ, signed by the defendant, in these words: "I acknowledge the service of the within writ." The entry of the judgment states the appearance of the plaintiff by his attorney, and proceeds thus: "And upon the affidavit of Moses Jones to the handwriting of the signature of Henry Norwood, to the acknowledgment of the service of the writ upon him, and on motion of the plaintiff by his attorney, and the defendant, being solemnly called, came not but made default," etc. The chief justice says: "The indorsement upon the process, purporting to be an acknowledgment of the service upon Norwood, is certainly not sufficient proof of that fact; but when it is shown that the acknowledgment is subscribed with the name of Norwood, in his own handwriting, the evidence is satisfactory to show that the act was his own." It is to be observed that this was a case where the party was seeking directly to reverse the judgment, and not one in which the judgment was simply used in evidence; and there the acknowledgment of service, when shown to be made by the defendant, was held equivalent to a sheriff's return of service, and authorized a judgment by default. If the record had been used in another collateral action, and there had been no entry that the signature of the defendant to the acknowledgment of service had been proved, the court in which it was thus offered as evidence would have been bound to intend that it had been proved; or rather, would have been bound to disregard the objection, because it was an objection only available in a proceeding to set aside or reverse the judgment. It was decided in this court as early as 1823, in *Cabeen v. Douglass*, 1 Mo. 336, that a sheriff's return to the original process forms a part of the record, and that error may

be assigned in it; which accords with *Norwood v. Riddle*, from Alabama. Now it is apparent that the objection made in this case to the judgment rendered against Shaw's administrator is within the same principle, and might be enforced in the same mode, that is, by writ of error. It can not, at this time, be necessary to cite and comment upon the authorities in which the doctrine is maintained that a purchaser at sheriff's sale is not affected by any error or irregularity in the judgment or other proceedings which resulted in the sale, unless they are of a character that rendered the whole proceeding a nullity. The objection now taken to the judgment against Shaw's administrator, that the defendant acknowledged the service of the *scire facias* by an indorsement on the writ, instead of that fact being returned by the sheriff, is not supposed to affect the validity of the judgment when used in this case.

2. Another objection is taken to this sheriff's deed, which is, that it appears that the property was levied on and advertised on the twenty-seventh of November, and was sold on the ninth of December, and that consequently the notice required to be given by the sheriff had not been given. In the sheriff's deed it is stated that twenty days' notice of the time and place of sale had been given by six hand-bills affixed in the most public places in the county of Pike. It is true that a notice of the sheriff's sale which is appended to the deed is dated at the bottom, "November 27, 1823," and in his deed the sheriff states that under the execution he levied upon the property on the twenty-seventh of November, 1823. So far as the question is affected by the date of the advertisement, there is no difficulty in reconciling that with the statement in the deed that twenty days' notice of the sale was given, for it would be an entirely legal notice, and a discharge of the duty enjoined by the statute, if the paper called the notice had been set up for twenty days at the proper places, although it was dated on the twenty-seventh of November, or had any other date, or no date at all. The statement in the deed that the sheriff had levied upon the property on the twenty-seventh of November is not the statement of a fact inconsistent with the statement that twenty days' notice of the sale had been given. There was no act required or authorized by law to be done by the sheriff which amounted to a levy, as that word is understood when applied to the service of personal property. He could not take possession, or in any manner interfere with the possession of the property. The word "levy," as used in deeds made by sheriffs for real estate,

has no significance, and when used, the date of it is commonly copied from the advertisements put up in the county or printed in the newspaper. The statute which required the sheriff to make a deed to the purchaser prescribed its recitals, and directed that it should "recite the execution, purchase, and consideration:" Geyer's Dig. 267, sec. 66. If it be said the recital of the fact that notice of the sale was given was not required by this act, and is therefore no more evidence of that fact than the recital of the time of levy is evidence of the commencement of the sheriff's proceedings under the execution, it may be answered that the sheriff was, by law, required to give notice, and he was not required by law to do any act prior to the notice, nor was he required to do any other act than give notice prior to the sale. If, therefore, the levy mentioned in the deed means the giving of notice on the twenty-seventh of November, then this statement would conflict with the sheriff's recital in the deed that he had given twenty days' notice of the sale; and between these two recitals, thus conflicting, we would give effect to that which alleged the performance of a duty required of the sheriff before the sale. But it is a more useful answer to this and similar objections to such sales, that the purchaser is not affected by any irregularity in the sheriff's proceedings in making sale under an execution, unless he has participated in occasioning it, or there has been some departure from the requirements of the law for some fraudulent purpose. The doctrine which has been maintained in the courts of Kentucky, upon this point, is sustained by reason, and is of the utmost value in a country where real estate is subject to sale on execution. It has been there decided that the omission of the sheriff to advertise the sale of land, as required by law, does not vitiate the sale to a fair purchaser: *Webber v. Cox*, 6 T. B. Mon. 110 [17 Am. Dec. 127]. Judge Owsley, in giving the opinion of the court, says: "It would indeed be out of the power of all those who might be disposed to buy at such sales to ascertain and know whether or not the officer by whom the property is exposed to sale has, in every respect, complied with the provisions of the law, and if every failure on his part to do so was allowed to affect the sale, but few would venture to become purchasers at such sales, and the interests of both creditor and debtor would be greatly prejudiced. The same doctrine is declared in an opinion by Chief Justice Boyle, in *Lawrence v. Speed*, 2 Bibb. 401. The sheriff is held liable to the defendant in the execution for any damages resulting from his

omission, and if there is any fraudulent omission of which the purchaser has notice, the sale will be held void. This seems to have been the doctrine settled in that state, as well as in others, and commends itself to our reason, as necessary to the interest of all parties concerned in such sales, as well debtors as creditors. The view taken of this branch of the plaintiffs' title, in the court below, was erroneous, as the sheriff's deed was excluded from consideration by an instruction given for the defendants.

3. The circuit court sustained the other part of the plaintiffs' title, which was set up under the coroner's deed made to Block, and in sustaining this part of the title there was an error committed in favor of the plaintiffs and against the defendants. At the time of the coroner's sale to Block, the deed to Bryson was not recorded, nor was it at the date of the coroner's deed which is dated April 14, 1824. But the deed to Block was not recorded until August 10th, more than three months after its date, and seven days after the deed to Bryson was recorded.

Now, if the effect of these deeds is to be determined by the act of 1817, that to Bryson will be the better title. Under the second section of that act, 1 Terr. Laws, 543, the deed to Bryson, not being recorded within three months from its date, was declared to be void as against subsequent purchasers so recording their deeds within the time prescribed by that section, that is, within three months from their date. Block's deed, being dated on the fourteenth of April, and not recorded until the tenth of August, was not recorded within three months from its date, so that the grantee in it is not in a condition to dispute the deed to Bryson on account of its not being recorded in time. If it be said it was not acknowledged until August, and was immediately recorded, the answer is ready and effectual—the statute fixes the date of the deed as the commencement of the three months within which it is to be recorded. It appears, on examining the certificate of acknowledgment, that the clerk certifies that the deed, on the day on which it was acknowledged, was signed and sealed by the sheriff in open court; but this is a fact which the law has not intrusted him to certify, and his certificate to that fact is of no value.

If the act of 1821 were applicable to the case, it would as decidedly give the preference to Bryson's deed; for under it the deed to Block would not have any effect as against Bryson until it was filed for record, and before that event Bryson's deed was recorded. But it is not thought that the act of 1821 applies

to the case, for reasons not necessary now to be stated, and this part of the title is disposed of under the act of 1817. The instructions given by the court, which declared Bryson's deed void as against the coroner's deed to Block, were erroneous.

The case as now presented upon the record requires that there should be another trial for the purpose of determining whether the title under the sheriff's deed to Block shall prevail against Bryson's deed. The circuit court, after deciding that the defects in the proceedings against Shaw's administrator render the sale and deed a mere nullity, proceeded upon the coroner's deed, and found for the plaintiffs for the part conveyed by it. As this latter deed is held by this court to be inoperative upon the case presented in this record, because not recorded in the time required by the act then in force, the chief object of another trial will be to determine whether Block had notice of Bryson's title when he purchased at the sheriff's sale. Upon this point the evidence in the record is very strong, but it is a question of fact to be determined by a jury.

4. Although the question, whether an unrecorded deed, which was made subject to the act of 1817, will prevail in a court of law over the title of a purchaser with notice of such deed, is not one of very general importance at this time, yet it arises in this case, and may as well be decided.

In England, as late as the case of *Doe v. Allsop*, 5 Barn. & Ald. 142, it has been considered as a new question, under the statute of 7 Anne, c. 20, whether a court of law could sustain an unregistered deed against a subsequent purchaser on the ground of notice. In *Jackson v. Burgott*, 10 Johns. 458 [6 Am. Dec. 349], the question is discussed by Chief Justice Kent, and the opinion expressed that the subsequent purchaser, taking his conveyance with notice of the prior unregistered deed, is guilty of a fraud, and that a court of law, as well as a court of equity, can grant relief against a deed thus fraudulently made, and that notice is equivalent to the registry. A subsequent statute in that state introduced the words "*bona fide* purchaser," which of course rendered notice as effectual as registry. The decisions in different states differ upon this question, but it is both most just and most reasonable to give effect to the notice of an unrecorded deed in a court of law, as well as a court of equity.

Let the judgment be reversed, the other judges concurring.

CERTIFICATES OR ACKNOWLEDGMENTS, CONCLUSIVENESS OF: See *Hartley v. Frost*, 55 Am. Dec. 772, and note; *Louden v. Blythe*, Id. 527.

ACTUAL OR CONSTRUCTIVE NOTICE OF UNRECORDED DEED is as effectual as registration against one having such notice: *McConnell v. Reed*, 38 Am. Dec. 124, and note; *Price v. McDonald*, 54 Id. 657, and note. See also *Davis v. Ownby*, 55 Id. 105; *McLaughlin v. Shepherd*, 53 Id. 646.

PURCHASER AT EXECUTION SALE IS NOT AFFECTED BY WHAT IRREGULARITIES: See *Byers v. Fowler*, 54 Am. Dec. 271, and note. The principal case was cited on the point that the purchaser was not affected by irregularities in the proceedings resulting in the sale unless of a character to render the proceedings wholly void, at least in a collateral way, in *Cobell v. Grubbs*, 48 Mo. 356.

FAILURE OF SHERIFF TO GIVE NOTICE OF EXECUTION SALE, EFFECT OF: See *Howard v. North*, 51 Am. Dec. 769. The principal case was cited in *Ladd v. Shippie*, 57 Mo. 530, to the point that if a purchaser at an execution sale can show an authorized execution and deed, a correct levy and notice may be presumed, and the doctrine of the principal case that the purchaser at a sheriff's sale was not affected by any irregularities in the notice unless he participated, was regarded as sound in *Curd v. Luckland*, 49 Id. 454.

THE PRINCIPAL CASE WAS AFFIRMED in *Draper v. Bryson*, 26 Mo. 108.

SMITH v. BRINKER.

[17 MISSOURI, 148.]

PURCHASER AT EXECUTION SALE OF LESSEE'S INTEREST IN LEASE IS LIABLE FOR RENT reserved to the lessor, and this whether he had possession or not; for if he suffer the original lessee to remain in possession, it is his voluntary act.

APPEAL from the St. Louis common pleas. The opinion states the case.

R. M. Field, for the appellants.

C. C. Whittelsey, contra.

By Court, RYLAND, J. Brinker was lessee under Smith of a tenement, reserving a certain rent. This rent Brinker covenantated to pay quarterly. Brinker took possession under the lease. Rippey, having a judgment against Brinker, had the estate and interest of Brinker in the leased premises sold by the sheriff, under execution, and bought it in himself and took a deed. The rents not being paid, Smith brought suit in ejectment against Brinker and Rippey, and in the same suit, claimed against Rippey the amount of rent accruing after his purchase of the premises under execution, and against Brinker the whole rent. To this suit Rippey answered, setting up as a defense that he had never entered into possession, and that Brinker, who was in possession, had never attorned to him. The court,

on plaintiff's motion, struck out this answer, and giving judgment for the plaintiff, Rippey brings his appeal to this court.

The appellants' counsel relies, for reversing the judgment of the court below, on the case of *McKee v. Angelrodt*, 16 Mo. 283, decided by this court at its last term. In that case, the lease was assigned by way of mortgage; "it was a mere security for the payment of money; the assignees never took possession; it never entered into the heads of the assignees that the mortgage to them, in order to secure the money due to them, made them liable to pay the rent for the lease. We therefore hold that possession in the assignee is necessary, in order to create a liability to pay rent; that the assignee must be in a situation to receive the benefits before he can be made to suffer the burden. Possession is the mother of his liability." Such is the language of this court in that case.

The present case differs widely from that. Here, one of these defendants proceeds against the other to have his interest in property held under a lease sold by the sheriff under execution, and becomes the purchaser, thereby acquiring all the estate and interest that the original lessee had. This purchase was not like the taking of a mortgage of the lease by way of security, but it was so far the payment of the debt. Now, if the purchaser suffered the original lessee to remain in possession, it was his own voluntary act. The owner is entitled to pursue one or both for the rent; and after the sale under execution, we think the purchaser liable for the after-accruing rent, whether he had possession actually or not. We will not carry the doctrine of *McKee v. Angelrodt* any further than it is there laid down. That was a mere security. There was not an absolute assignment of the lease, but a mortgage of it; and before the mortgagee becomes in such a case liable for rent, he must have possession; he must receive the benefits before he should be made to bear the burden.

The judgment of the court below, then, was proper, and the same is hereby, with the concurrence of the other judges, affirmed.

ASSIGNEE OF LESSEE, LIABILITY OF, FOR RENT: See *Childs v. Clark*, 49 Am. Dec. 164, and note. The principal case was cited in *Willi v. Dryden*, 52 Mo. 322, on the point that a person who receives an absolute assignment of a lease is liable to the lessors for rent.

DICK, EXECUTOR, v. PAGE & BACON.

[17 Missouri, 284.]

RULE THAT ACTS OF AGENT AFTER PRINCIPAL'S DEATH ARE INVALID applies to those acts which must be done in the name of the principal, and not to those acts not required to be done in the name of the principal; and such acts, if none of the parties had notice of the principal's death, are binding.

APPEAL from the St. Louis common pleas. The opinion states the case.

Knox and Kellogg, for the appellants.

F. A. Dick, contra.

By Court, Scott, J. This was an action in the nature of *assumpsit*, brought by the respondent against the appellants for money received by them, belonging, as it was alleged, to the testator of the respondent. There was a judgment for the respondent. It appears that Page & Bacon were bankers in St. Louis, doing the business of buying and selling bills of exchange, and that the testator of the respondent dealt with them; that he, being in bad health and about to leave St. Louis, requested Bacon to call and see him; that Bacon did so, and Doughty asked him to make advances to his agent, if he should call upon him for money; that Nicholson, the agent of Doughty, was present, and Doughty charged him, whether he lived or died, to secure Page & Bacon for any advances they might make on his account. After this, Doughty went to New Orleans, and died on the eleventh day of March, 1851. Afterwards, on the nineteenth day of the same month, Nicholson, the clerk and agent of Doughty, wanting funds for his business, purchased of Page & Bacon a bill of exchange on the east for two thousand dollars, and placed in their hands, as collateral security, notes to an amount exceeding two thousand six hundred dollars. All these notes except one were paid to Page & Bacon. This suit is brought to recover the money so received. It is admitted that none of the parties to this transaction had notice of the death of Doughty at the time it took place, and there would have been no question as to the authority of Nicholson had Doughty been alive at the time the acts were done. The money received by Nicholson from Page & Bacon was applied to the payment of the debts of Doughty. On these facts, a judgment was rendered in favor of the plaintiff.

Chancellor Kent, in speaking of the revocation of the au-

thority of an agent, says that it is determined by the death of his principal: 2 Kent's Com. 645. It is, moreover, said that the equitable principle of the civil law, that the acts of an agent, done *bona fide* after the death of the principal, and before notice of his death, are valid and binding on his representatives, does not prevail in the English law.

This principle, which is sustained by American and English authorities, is applied to those cases in which a right is claimed through an act done by an agent in the name of his principal, who was dead at the time the act was done. The idea is, that such an act is a necessary link in the chain of title to the right asserted, and without showing the authority of the agent, there can be no recovery. The cases of *Watson v. King*, 4 Camp. 272; *Harper v. Little*, 2 Greenl. 14 [11 Am. Dec. 25]; *Shipman v. Thompson*, Willes, 103; *Wynne v. Thomas*, Id. 563, are of this class. The case of *The King v. The Corporation of Bedford Level*, 6 East, 356, it is conceived, has nothing to do with this case, as the point of it is, that a deputy register can not do a valid act after the death of the register. In the case first above cited, the reason is given in which the English law is founded, which is that a valid act can not be done in the name of a dead man. Where a right is claimed, or a defense is set up, grounded on an act done by an agent in pursuance to his power in the name of his principal, and it is shown that the principal was dead at the time the act was done, the rule above stated may interpose an obstacle in the way of him who relies on the act of the agent. There are respectable authorities which maintain that the common and civil law harmonize on this subject. So the law is understood to be in Pennsylvania. Chitty, in his work on commerce and manufactures, page 223, states the law to be that the acts of a legal agent may be good after the death of his principal, before notice thereof to those who are interested in his acts, as being done under a color of authority which strangers could not examine. Russell, another English author, in his work on factors and brokers, maintains similar views with regard to the common law: p. 360. Judge Story, in his work on agency, acquiesces in the common law, as applied in the cited cases, and inclines to the opinion that the law is not liable to the reproach to which a difference from the civil law on this point would subject it, and that the systems may be reconciled, and that where the act, notwithstanding the death of the principal, can and may be done in the name of the agent, his death should not be deemed to be a positive revocation under all circum-

stances, and that a subsequent execution of it may be valid; but that, where the act is required to be done in the name of the principal, the same objection would seem to lie to it in the foreign law as does lie in our law, and that the difference on this subject between our law and the latter seems to rest, not so much upon a difference of principle, as upon the difference in the modes of executing the authority: Sec. 495.

In the case under consideration, the notes left with Page & Bacon were in the possession of Nicholson. He could impart an equitable interest in them without using the name of Doughty. Page & Bacon, to maintain their defense, insist on no act of the agent in the name of the principal. Nicholson may be regarded as a factor of Doughty, with authority to pass the notes by delivery, so as to warrant Page & Bacon in receiving the money due on them. To hold that this transaction is void would shock the sense of justice of every man, and we can not be persuaded that a principle which would produce such a result should be applied to the facts which exist in this case.

The judgment is reversed, the other judges concurring.

DEATH OF PRINCIPAL, EFFECT OF, ON ACTS OF AGENT: See the note to *Cassiday v. McKenney*, 39 Am. Dec. 76, discussing this subject; *Knapp v. Alcord*, 40 Id. 241.

STATE v. HOMES.

[17 MISSOURI, 379.]

DEFENDANT IS NOT GUILTY OF LARCENY IN TAKING PROPERTY UNDER FAIR COLOR OF CLAIM OR TITLE, although he may be mistaken.

IT IS NO ERROR TO REFUSE INSTRUCTION ASKING COURT TO COMMENT UPON FACTS in proof, or to direct the minds of the jury to such facts.

INDICTMENT for larceny in stealing hogs, marked by and belonging to one Price. The evidence for the defendant showed that he had formerly lived in the neighborhood where the alleged larceny was committed, and owned a number of hogs, which he left running at large there on moving. He had purchased these hogs from different persons, and they had different marks. Defendant was informed that some persons were supposed to have altered the marks on the hogs, and he was advised to kill them, as others would kill them, if he would not. He then went to the neighborhood with a number of dogs and men, and in the day-time killed them openly, making much noise in setting the dogs on the hogs and shooting them. Among the hogs killed

were those belonging to Price. The defendant's good character for honesty was proved. He prayed the following instructions, but they were refused: 1. If there is any fair claim of property or rights to the defendant's hogs, or if this fact be brought into doubt at all, the jury must acquit; 2. That the manner, place, and time of the killing of the hogs, and of the taking possession of them, together with the circumstance that defendant was the owner of hogs in the neighborhood, were facts to be considered by the jury in arriving at their verdict. The material instructions given are stated in the opinion. The defendant was found guilty, and a motion for a new trial being overruled, he appealed.

F. Spies, for the appellant.

J. R. Lackland, for the state.

By Court, RYLAND, J. The attention of this court will be called to the instructions only which the criminal court gave and refused to give on the trial in this case.

The instructions refused appear in the above statement; those given are as follows: "If the jury believe from the evidence that the defendant, in St. Louis county, and within three years next preceding the finding of this indictment, did steal, take, and carry away any of the hogs charged as the property of Frederick Price, of any value whatever, and that he did so steal for the purpose of converting the same to his own use, they will find the defendant guilty of grand larceny." The other instructions given have reference to the doctrine of possession of stolen property, of the punishment for grand larceny, and of doubt, etc.

1. From the facts preserved on the record of this case, it is the opinion of this court that the criminal court should have given the first instruction prayed by defendant, as set forth in the statement above. The instructions given by the court do not put the doctrine contended for by the defendant in that instruction before the jury, and yet that is a well-founded principle in criminal law. If the defendant takes the property in a fair color of claim or title, though he may be mistaken, yet there is wanting one essential ingredient to the felony, namely, the felonious intent with which the property was taken; without this intent it is no larceny.

2. The second instruction prayed for contains no law—it is merely asking the court to comment upon the facts in proof, or

to direct the minds of the jurors to such facts. It is no error to fail to do this. In the instructions given to the jury, it would have been more in accordance with the law for the court to have defined the offense; to have told the jury what constituted larceny, instead of saying, if they believed that the defendant did steal, etc.

The court erred in not giving the first instruction prayed for by the defendant, and for this its judgment must be reversed.

The other judges concurring, the judgment is reversed and cause remanded.

DEFINITION OF LARCENY.—Bishop defines larceny to be “the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein:” 2 Bishop on Crim. L., sec. 758. “‘The definitions of larceny,’ said Baron Parke, an eminent judge [*Regina v. Holloway*, 2 Car. & Kir. 945], ‘are none of them complete; Mr. East’s is the most so, but that wants some little explanation. His definition is “the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker’s) own use, and make them his own property, without the consent of the owner.” This is defective in not stating what the definition of “felonious” in this definition is. It may be explained to mean that there is no color of right or excuse for the act; and the “intent” must be to deprive the owner, not temporarily, but permanently, of his property. Cases also show that a taking of the goods with an intent to return them is not larceny.’ From this definition differ those of Coke, Hawkins, and Blackstone in the omission of two important requisites: first, the ‘conversion to the taker’s own use;’ and secondly, ‘without the consent of the owner.’ Blackstone, for instance, contents himself with declaring larceny to be ‘the felonious taking and carrying away of the personal goods of another.’ That this definition is defective in omitting ‘without the consent of the owner’ is now universally conceded:” Wharton’s Crim. L., sec. 862. However writers may differ on the definition of larceny, all concede that to constitute larceny there must be a taking, a carrying away technically called an asportation, and a felonious intent. We shall first treat of these attributes of larceny, and then of particular acts which have been held larceny or not according to circumstances.

CAPTION AND ASPORTATION.—The taking is a material part of the larceny: *Pennsylvania v. Myers*, Add. 320; the property must have been in the actual or constructive possession of the owner: *People v. McDonald*, 43 N. Y. 61; *Hite v. State*, 9 Yerg. 198; and the possession must be taken from the owner, or from some one holding for the owner: *Gadsdon v. State*, 38 Tex. 350. In *State v. Ledford*, 67 N. C. 60, it was held that the taking must be done fraudulently and secretly, so as not only to deprive the owner of his property, but also to leave him without knowledge of the taker. But no other case has gone so far as this, and this proposition is not supported by authority. There must be a trespass in the taking, and it must be against the owner’s consent as a general rule: *Wright v. State*, 5 Yerg. 154; *Hite v. State*, 9 Id. 198; *McMahon v. State*, 1 Tex. App. 102; *Regina v. Prince*, 33

L. J. M. C. 8. Larceny may be committed of goods obtained from the owner by delivery, if obtained *animus furandi*: *State v. Gorman*, 2 Nott & M. 90; S. C., 10 Am. Dec. 576; as where the goods were obtained by means of false pretenses or representations, see *post*, head "obtaining goods by false pretenses and representations." And if the defendant obtain possession merely of the goods with the consent of the owner, but with the felonious intent of depriving the owner of the value of the property and appropriating the same, he is guilty of larceny: *Keonio v. State*, 4 Tex. App. 173; *Commonwealth v. Barry*, 124 Mass. 325; *Murphy v. People*, 104 Ill. 528; S. C., 27 Alb. L. J. 164; 28 Id. 157; 15 Rep., N. S., 300; *Welsh v. People*, 17 Ill. 339; *Elliott v. Commonwealth*, 12 Bush, 176; *State v. Watson*, 41 N. H. 533; *Macino v. People*, 19 N. Y. Supreme Ct. 127; but if the owner parts voluntarily with the possession and title, neither the taking nor the conversion is felonious: *Welsh v. People*, *supra*; *Murphy v. People*, *supra*; *Elliott v. Commonwealth*, *supra*. It is not consent to the taking for the owner to obtain the aid of a detective, who, for the purpose of detection, joins the defendant in the crime designed by the defendant and carried into execution: *Pigg v. State*, 43 Tex. 108. And the assent of the prosecutor to give facility to the commission of the larceny for the purpose of detecting the offender will not do away with the felony: *Rex v. Egginton*, 2 Leach, 913; and see, on this point, *Regina v. Williams*, 1 Car. & Kir. 195.

There must be some asportation. It is not sufficient that the defendant have the power to remove the article: *State v. Alexander*, 74 N. C. 232. In Texas, by statute, the necessity of asportation has been done away with, and in that state, now, larceny may be complete without any asportation: *Harberger v. State*, 4 Tex. App. 26; S. C., 30 Am. Rep. 157; *Musquez v. State*, 41 Tex. 226; *Hall v. State*, Id. 287; *Austin v. State*, 42 Id. 345; *Prim v. State*, 32 Id. 157. In the other states, however, the common-law rule remains unchanged. The slightest asportation is sufficient: *Regina v. Simpson*, Dears. C. C. 421; *Eckels v. State*, 20 Ohio St. 508; *Gettinger v. State*, 13 Neb. 308; S. C., 27 Alb. L. J. 42; 14 N. W. Rep. 403; *Lundy v. State*, 60 Ga. 143. It is immaterial that the prisoner had possession but a short time: *Garris v. State*, 35 Id. 247. A mere temporary possession, though but momentary, is sufficient: *Harrison v. People*, 50 N. Y. 518; S. C., 10 Am. Rep. 517. If one takes goods out of the place where they are put, although he is detected before they are actually carried away, the larceny is complete: *State v. Wilson*, 1 N. J. L. 439; so, also, the asportation is sufficient if the goods are removed from the place where they were, and the thief has for an instant the entire and absolute possession of them: *State v. Jackson*, 65 N. C. 305. And in the following cases the asportation has been held sufficient: Where a defendant, indicted for stealing money from a drawer, had actually taken the money into his hand, and lifted it from the spot where the owner placed it, with the intention of stealing it, although he dropped it into the place in which it was lying upon being discovered, and never had it out of the drawer: *Eckels v. State*, 20 Ohio St. 508; and removed a drawer containing money from a safe, and handled the money in the drawer at the door of the safe: *State v. Green*, 81 N. C. 560; and lifted a bag from the bottom of a boot of a coach, although it was not entirely removed from the spot it first occupied, each part being removed from the place that specific part had occupied: *Rex v. Walsh*, 1 Moo. C. C. 14; and removed a package from one end of a wagon to the other: *Anon.*, 2 East P. C. 556; *Rex v. Cooley*, 1 Leach, 236; but see, on this point, *Rex v. Cherry*, Id. 236, note; and drew porter into a can: *Regina v. Wallis*, 3 Cox C. C. 67; and broke open a box of shoes upon

a ship and took out the shoes and concealed them in the vessel: *Nuttall v. State*, 60 Ga. 264; and thrust his hand into the pocket of another, seizing his pocket-book and lifting it, without taking it out of the pocket: *Harrison v. People*, 50 N. Y. 518; S. C., 10 Am. Rep. 517; and see also *Commonwealth v. Luckis*, 99 Mass. 431. But in *Rex v. Thompson*, 1 Mob. C. C. 78, it was said that to constitute larceny from the person there must be a complete removal from the person, and that removal from the place where it was, if it remained throughout with the person, was not sufficient, and if there was nothing in the pocket, a thrusting of the hand into it, with felonious intent to steal any property that might be there, was not larceny: *Regina v. Collins*, L. & C. 471. The turning of a barrel of turpentine, which was standing on its head, over on its side is not a sufficient asportation: *State v. Jones*, 65 N. C. 395; and to shoot and chase a hog, without removing it after it is shot, is not felony, on account of a want of asportation: *State v. Seagler*, 1 Rich. 30; S. C., 42 Am. Dec. 404; and where the prisoner stopped the prosecutor, who was carrying a feather-bed, and told him to lay it down or he would shoot, and the prosecutor laid it down, but the defendant was apprehended before he could take it up or remove it, there is no asportation: *Rex v. Farrell*, 1 Leach, 322, note. And where poachers wrongfully killed a number of rabbits upon the land of the crown, and placed them in a ditch upon the same land, some strapped together and some in bags, with no intention of abandoning the wrongful possession of them, but using the ditch as a place of deposit, and three hours after came back and began to remove the rabbits, it was held that the removal was no larceny, as the taking of the rabbits and the removal were one continuous act: *Regina v. Townley*, L. R., 1 C. C., 315.

In regard to things that are a part of the realty, it must be proved that they were severed. If the severance and asportation were one continuous act, the taking is but a trespass: *United States v. Wagner*, 1 Cranch C. Ct. 314; *Bradford v. State*, 6 Lea, 634; but if any time elapses, it is larceny: *Bradford v. State*, *supra*; but in *Smith v. Commonwealth*, 14 Bush, 31; S. C., 29 Am. Rep. 402, it was held that if chandeliers attached to the freehold were taken, it was immaterial whether the carrying away was immediate and continuous, or the removal was at different times.

INTENT.—To constitute the offense of larceny, it is absolutely necessary that the taking of the goods be with a felonious intent: *Regina v. Hayward*, 1 Car. & Kir. 518; *Rex v. Crump*, Id. 658; *Regina v. Godfrey*, 8 Id. 563; *Regina v. Reid*, Car. & M. 306; *Regina v. Davis*, Dears. C. C. 640; *Rex v. Phillips*, 2 East P. C. 662; *Regina v. Hare*, 3 F. & F. 315; *Rex v. Horner*, 1 Leach, 270; *Regina v. Halford*, 18 L. T., N. S., 334; *Rex v. Dickenson*, Russ. & R. 420; *Regina v. Bailey*, L. R., 1 C. C., 347; *People v. York*, 5 Harr. 493; *State v. Hawkins*, 8 Port. 461; S. C., 33 Am. Dec. 294; *Williams v. State*, 44 Ala. 396; *Bailey v. State*, 58 Id. 414; *Rountree v. State*, Id. 381; *Mason v. State*, 32 Ark. 238; *People v. Cheong Foon Ark*, 61 Cal. 527; *Miller v. People*, 4 Col. 182; *Lang v. State*, 11 Fla. 295; *Baker v. State*, 17 Id. 408; *Smith v. Shultz*, 2 Ill. 490; S. C., 32 Am. Dec. 33; *Phelps v. People*, 55 Id. 334; *Hart v. State*, 57 Ind. 102; *Umphrey v. State*, 63 Id. 223; *Cummins v. People*, 11 N. W. Rep. 186 (Mich.); *People v. Cummins*, 11 Id. 184 (Mich.); *McDaniel v. State*, 8 Smed. & M. 401; S. C., 27 Am. Dec. 93; *Watkins v. State*, 60 Miss. 323; *State v. Gresser*, 19 Mo. 247; *State v. Mathews*, 20 Id. 55; *State v. Stone*, 68 Id. 101; *Wilson v. People*, 39 N. Y. 459; *Bassett v. Spofford*, 45 Id. 387; *McCourt v. People*, 64 Id. 583; *Devine v. People*, 20 Hun, 98; *People v. Burton*, 16 N. Y. Week. Dig. 195; *People v.*

Tweed, 14 Id. 492; *People v. Woodward*, 29 Alb. L. J. 183 (N. Y.); *Isaacs v. State*, 30 Tex. 450; *Gardiner v. State*, 33 Id. 692; *Johnson v. State*, 36 Id. 375; *Mullins v. State*, 37 Id. 337; *Varas v. State*, 41 Id. 527; *Johnson v. State*, Id. 608; *Quitrow v. State*, 1 Tex. App. 65; S. C., 28 Am. Rep. 397; *Parchman v. State*, 2 Id. 228; *Logan v. State*, Id. 408; *Taylor v. State*, 5 Id. 529; *Ainsworth v. State*, 11 Id. 339; *Landin v. State*, 10 Id. 63; S. C., 12 Rep., N. S., 253; *Dreyer v. State*, 11 Id. 631; *Hardeman v. State*, 12 Id. 207; *Dow v. State*, Id. 343; *Muldrew v. State*, Id. 617; *Blunt v. Commonwealth*, 4 Leigh, 689; S. C., 26 Am. Dec. 341. Consequently, if the defendant takes the property under an honest belief that he has a right to do so, or under a fair claim of right, he is not guilty of larceny, although his claim prove unfounded: *Regina v. Wade*, 11 Cox C. C. 549; *Rex v. Jackson*, 1 Moo. C. C. 119; *Baker v. State*, 17 Fla. 406; *State v. Barrackmore*, 47 Iowa, 684; *Commonwealth v. Wild*, Thach. Cr. Caa. 157; *Kay v. State*, 40 Tex. 29; *Varas v. State*, 41 Id. 527; *Smith v. State*, 42 Id. 444; *Debb's v. State*, 43 Id. 650; *Lawrence v. State*, Id. 306; *Sigler v. State*, 9 Tex. App. 428; *State v. Leichan*, 41 Wis. 565; and a taking by mistake or accident is not larceny: *Long v. State*, 11 Fla. 295; nor under the direction of another to whom the defendant believed it to belong: *State v. Matthews*, 20 Mo. 55; or from idle curiosity: *Regina v. Godfrey*, 8 Car. & P. 563; nor in jest: *Devine v. People*, 20 Hun, 98; but the supposition of the thief that the article belonged to one indebted to him is no defense, even if the supposition is true: *Gettinger v. State*, 13 Neb. 308; S. C., 14 N. W. Rep. 403; 27 Alb. L. J. 42.

It has been held that the taking must be *lucri causa*: *United States v. Dunklee*, 1 McAll. 196; and Wharton appears to favor this view of the law; but in a number of cases the contrary doctrine has been held: *Rex v. Cabbage*, Russ. & R. 292; *Regina v. Jones*, 1 Den. C. C. 188; *Regina v. Privett*, 2 Car. & Kir. 114; *Rex v. Handley*, Car. & M. 547; *Rex v. Morfit*, Russ. & R. 307; *Williams v. State*, 52 Ala. 411; *People v. Juarez*, 28 Cal. 380; *State v. Ryan*, 12 Nev. 401; S. C., 28 Am. Rep. 802; *Keely v. State*, 14 Ind. 36; *Hamilton v. State*, 35 Miss. 214; *Warden v. State*, 60 Id. 638. An intent to destroy the property is sufficient: *Rex v. Cabbage*, *supra*; or to kill it from malice and to deprive the owner of it: *Warden v. State*, *supra*; but see *State v. Hawkins*, *supra*, where it was held that such an offense would be malicious mischief and not larceny. In *Rex v. Privett*, *Regina v. Handley*, and *Rex v. Morfit*, all *supra*, it was held that servants who clandestinely took their master's oats with the intention of giving them to their master's horses, and without any intent to apply them to their private benefit, were guilty of larceny. Wharton, who in his work on criminal law, section 898, disapproves of these decisions, says: "If this law is good, it makes it a larceny for a cook to take without authority from her master's store articles to improve her master's cooking, and for a nurse to give without authority the parents' food to be eaten by the child;" and at section 899 he says: "The severe penalties of larceny, as a system of pillage which society must put down, must be maintained in their rigor; but it will be destructive of the humanities of life to extend these penalties and infamies to every case where property is taken without the taint of selfish greed in the taker." On the other hand, Bishop, in his Criminal Law, section 848, treating this subject on principle, says: "The entire doctrine of larceny in our law is so technical as to render almost hopeless any attempt to settle a disputed point by an appeal to principle. Still, on the present question, if the *lucri causa* is required, this is placing the love of greed as a base motive,

pre-eminent over all other base motives. For it is immaterial to the person injured what species of base motive moved the wrong-doer. And the wrong to society is the same, whatever the nature of the baseness which prompted it. But, in reason, there are other evil motives as deserving of punishment as this which we term the love of greed."

The defendant should take the property with the intention of depriving the owner of the goods permanently, otherwise the offense will not be larceny: *Regina v. Holloway*, 2 Car. & Kir. 942; *Regina v. Guernsey*, 1 F. & F. 294; *Regina v. Poole*, 7 Cox C. C. 373; *Rex v. Webb*, 1 Moo. C. C. 431; *Fields v. State*, 6 Coldw. 524; *State v. South*, 28 N. J. L. 28; *State v. Self*, 1 Bay, 242; *Johnson v. State*, 36 Tex. 375; *State v. Ryan*, 12 Nev. 401; S. C., 28 Am. Rep. 802. Thus one taking another's horse, without any intention of converting him to his own use, but to ride for some miles, and then abandoning him, is not guilty of larceny: *Dove v. State*, 37 Ark. 261; *Rex v. Phillips*, 2 East P. C. 662; as where the horse was taken by a slave running away to facilitate his escape: *People v. York*, 5 Harr. 493; or by a thief for the same purpose: *Rex v. Crump*, 1 Car. & P. 658; but a taking away and concealing of property, with the intent to conceal it until the owner offers a reward, is larceny: *Berry v. State*, 31 Ohio St. 219; S. C., 27 Am. Rep. 506. In *Regina v. Phetheon*, 9 Car. & P. 552, it was held that while the defense to a charge of stealing that the prisoner pawned the property with the intention of redeeming it was not a defense to be generally encouraged, yet if clearly made out in proof, it would prevail; but to make such a defense available, there must not only be the intent, but the ability to redeem: *Regina v. Mealland*, 2 Cox C. C. 292; and in the absence of such ability the offense is larceny: *Regina v. Trebilcock*, 7 Id. 408.

To constitute larceny, the felonious intent must exist at the time of the taking of the goods; and if there is no such intent then, no subsequently conceived felonious intent will render the defendant guilty of larceny: *Regina v. Evans*, Car. & M. 632; *Regina v. Thistle*, 3 Cox C. C. 573; S. C., 3 New Sess. Cas. 702; *Regina v. Cole*, 2 Cox C. C. 340; *Rex v. Charlewood*, 1 Leach, 409; *Rex v. Banks*, Russ. & R. 441; *Regina v. Davis*, Dears. C. C. 640; *Rex v. Mucklow*, 1 Moo. C. C. 160; *Bailey v. State*, 58 Ala. 414; *Umphrey v. State*, 63 Ind. 223; *Starck v. State*, Id. 285; S. C., 30 Am. Rep. 214; *State v. Wood*, 46 Iowa, 116; *State v. Conway*, 18 Mo. 321; *State v. Ware*, 62 Id. 597; *State v. Clifford*, 14 Nev. 72; S. C., 33 Am. Rep. 526; *Wilson v. People*, 39 N. Y. 459; *Abrams v. People*, 13 N. Y. Supreme Ct. 491; *People v. Anderson*, 14 Johns. 294; S. C., 7 Am. Dec. 462; *Commonwealth v. Smith*, 1 Penn. L. J. 34; *Reed v. State*, 8 Tex. App. 40; S. C., 34 Am. Rep. 732; *Hill v. State*, 28 Alb. L. J. 38; S. C., 15 Rep., N. S., 669 (Wis.) There have been a few exceptions allowed to this rule. Thus a subsequently conceived intention of converting the goods, carried into execution, was regarded as larceny, where the person obtained the possession by committing a trespass tortiously or unlawfully: *Commonwealth v. White*, 11 Cush. 483; and by means of false representations: *State v. Coombs*, 55 Me. 477; and where it was carried into effect by one having only the care, custody, or charge of the property for the owner: *People v. Call*, 1 Denio, 120; S. C., 43 Am. Dec. 655; *Regina v. Jones*, Car. & M. 611. Nor need a felonious intent at the time of obtaining the property exist in order to convict a servant of larceny by appropriating his master's goods; see on this point the head "larceny by servant," post.

Where a person has committed a larceny, no change of mind subsequently will purge the offense: *State v. Scott*, 64 N. C. 586; nor his voluntarily surrendering the property: *Georgia v. Kepford*, 45 Iowa, 48; nor even his paying for it: *Trafston v. State*, 5 Tex. App. 480.

WHAT ARTICLES ARE SUBJECT OF LARCENY.—The thing taken must be of some value: *Regina v. Morris*, 9 Car. & P. 349; *Wolverton v. Commonwealth*, 75 Va. 909; S. C., 13 Rep., N. S., 574; 6 Va. L. J. 224; *Payne v. People*, 6 Johns. 103; but it may be worth less than the smallest coin: *Wolverton v. Commonwealth*, *supra*; *Regina v. Morris*, *supra*. The following articles have been held subject of larceny: Lost property: *Tanner's Case*, 14 Gratt. 635; *Robinson v. State*, 11 Tex. App. 403; S. C., 40 Am. Rep. 790; 13 Rep., N. S., 508; *Pritchett v. State*, 2 Sneed, 285; but not abandoned property: *United States v. Smiley*, 6 Saw. 640; strays: *State v. Castrel*, 53 Mo. 124; a box of matches placed by the owner of a store on his counter for the use of his customers: *Mitchum v. State*, 45 Ala. 29. Choses in action were not subject to larceny at common law: *United States v. Davis*, 5 Mason, 356; *Culp v. State*, 1 Port. 33; S. C., 26 Am. Dec. 357; but this rule has been changed by statute, and the following are: obligations, bonds, bills obligatory, etc.: *Damewood v. State*, 2 Miss. 262; country bank notes, not then in circulation for value, in the course of transmission from one bank to another: *Regina v. West*, 7 Cox C. C. 183; the halves of a country bank note sent in a letter: *Rex v. Mead*, 4 Car. & P. 535; bank notes generally: *United States v. Marshall*, 5 Mason, 537; *Corbett v. State*, 31 Ala. 429; *State v. Allen*, R. M. Charl. 518; *Thomasson v. State*, 22 Ga. 499; *State v. Bond*, 8 Iowa, 540; *Commonwealth v. Rand*, 7 Met. 475; *McDonald v. State*, 8 Mo. 283; *State v. Banks*, Phill. L. 577; *Starkey v. State*, 6 Ohio St. 266; *State v. Wilson*, 3 Brev. 196; *State v. Tillery*, 1 Nott & M. 9; *State v. Casados*, Id. 91; *Pyland v. State*, 4 Sneed, 357; *Boyd's Case*, 1 Rob. (Va.) 691; *Cummings v. Commonwealth*, 2 Va. Cas. 128; *Pomeroy v. Commonwealth*, Id. 342; *Commonwealth v. Stebbins*, 8 Gray, 492; *Sansbury v. State*, 4 Tex. App. 99; *Gruson v. State*, 6 Miss. 33; *Sallie v. State*, 39 Ala. 691; but see, to the contrary, *United States v. Bowen*, 2 Cranch, C. Ct. 133; *United States v. Carnat*, Id. 489; *Culp v. State*, 1 Port. 33; *State v. Calvin*, 22 N. J. L. 207; *Johnson v. State*, 11 Ohio St. 324; notes in the nature of bank notes issued by an individual: *Sylvester v. Girard*, 4 Rawle, 185; bank bills redeemed by a bank and in the hands of its agents: *Commonwealth v. Rand*, 7 Met. 475; S. C., 41 Am. Dec. 455; but not foreign bank bills unless their value is proved: *Corbett v. State*, 31 Ala. 329; treasury notes: *Sallie v. State*, 39 Id. 691; and checks: *Regina v. Perry*, 1 Den. C. C. 69; *Commonwealth v. Yerkes*, 12 Cox C. C. 208. Certificates of stock are subject of larceny: *People v. Griffin*, 38 How. Pr. 475; and certificates of a foreign railroad company: *Regina v. Smith*, Dears. C. C. 581. Common receipts are not: *People v. Griffin*, 38 How. Pr. 475; *People v. Bradley*, 4 Park. Cr. C. 245; but see *People v. Loomis*, 4 Denio, 380; and an accountable receipt is: *People v. Bradley*, 4 Park. Cr. C. 245; so is a note payable in specific articles: Id.; and a pawnbroker's duplicate: *Regina v. Morrison*, Bell C. C. 158. A printed list of the names of subscribers to a paper and the dates up to which they have paid is not subject to larceny: *State v. James*, 58 N. H. 67; nor a written but unstamped agreement to build certain cottages: *Regina v. Watts*, Dears. C. C. 326; nor a commission to settle boundaries: *Rex v. Westbeer*, 2 Stra. 1133; a memorandum book is the subject of larceny: *Commonwealth v. Williams*, 9 Met. 273; so are public records: *Wilson v. State*, 5 Ark. 513; and rolls of parchment, unless they concern the realty: *Rex v. Walker*, 1 Moo. C. C. 155; and property used for gaming purposes: *Bales v. State*, 3 W. Va. 685; intoxicating liquors, though purchased and intended to be sold in violation of statute: *Commonwealth v. Coffee*, 9 Gray, 139; and money acquired by the illegal sale of intoxicating liquors: *Commonwealth v. Rourke*, 10 Cush. 397; illuminating gas: *Regina v. White*, 3 Car. & K. 363; *Common-*

wealth v. Shaw, 4 Allen, 308; water supplied by a water company to a customer and standing in his pipes: *Firms v. O'Brien*, 28 Alb. L. J. 460; ice put in an ice-house for domestic use: *Ward v. People*, 3 Hill (N. Y.), 395; S. C., 8 Id. 144.

Things attached to the freehold were not subject of larceny at the common law: *State v. Hall*, 5 Harr. 492; thus a nugget of gold separated from the vein by natural causes is not: *State v. Burt*, 64 N. C. 619; logs in a fence are not: *United States v. Smith*, 1 Cranch C. Ct. 475; growing crops were not by the common law, but have been made so by statute: *State v. Stephenson*, 2 Bailey, 334; *State v. Foy*, 82 N. C. 679; *Pinckard v. State*, 62 Ala. 167; *Gregg v. State*, 55 Id. 116; doors when attached to a house are not, but when severed are: *Ex parte Wilke*, 34 Tex. 155; and things savoring of the realty by severance become subject: *Bell v. State*, 4 Baxt. 428; chandeliers affixed to freehold are: *Smith v. Commonwealth*, 14 Bush, 31; S. C., 29 Am. Rep. 402; brass fixed to tombstones is, *semel*: *Rex v. Blick*, 4 Car. & P. 377; lead pipe fixed to a building is: *State v. Stone*, 30 N. J. L. 299; *Regina v. Rice*, Bell C. C. 87; *contra*: *Regina v. Gooch*, 8 Car. & P. 293; a leather belt connected with certain wheels in a saw-mill, and which may be removed readily and without injury, is: *Jackson v. State*, 10 Ohio St. 104; turpentine run out of trees into boxes cut into the trees for the purpose of receiving it is: *State v. Moore*, 11 Ired. L. 70; S. C., 53 Am. Dec. 401; key in a door is: *Hoskins v. Torrence*, 5 Blackf. 417; S. C., 35 Am. Dec. 129.

The general rule as to animals is, that if of a domestic nature, they are subject to larceny, but if *feræ naturæ*, they are not. Thus tame but unconfined pigeons are subject of larceny: *Rex v. Brooks*, 4 Car. & P. 131; *Regina v. Cheasor*, 2 Den. C. C. 361; pea-fowls are: *Commonwealth v. Beaman*, 8 Gray, 497; pheasants reared under a hen are: *Regina v. Head*, 1 F. & F. 350; *Regina v. Garnham*, 8 Cox C. C. 451; *Regina v. Cory*, 10 Id. 23; young partridges hatched and reared under a hen are: *Regina v. Shackle*, 38 L. J. M. C. 21; S. C., L. R., 1 C. C., 158; domestic turkeys are: *State v. Turner*, 66 N. C. 618; cattle are: *State v. Butler*, 65 Id. 309. But dogs were not the subject of larceny at common law: *Regina v. Robinson*, Bell C. C. 34; *People v. Campbell*, 4 Park. Cr. C. 386; *State v. Holder*, 81 N. C. 527; *State v. Lynns*, 26 Ohio St. 400; S. C., 20 Am. Rep. 772; *State v. Doe*, 79 Ind. 9; S. C., 41 Am. Rep. 599; *Ward v. State*, 48 Ala. 161; S. C., 17 Am. Rep. 31; but have been made so by statute in many cases: *People v. Campbell*, 4 Park. Cr. C. 386; *State v. Brown*, 9 Baxt. 53; S. C., 40 Am. Rep. 81; 25 Alb. L. J. 444; *Mullaly v. People*, 86 N. Y. 365; S. C., 13 N. Y. Week. Dig. 74; S. C., 12 Id. 236; *Harrington v. Miles*, 11 Kan. 480; S. C., 15 Am. Rep. 355; bees in the possession of the owner are subject of larceny: *State v. Murphy*, 8 Blackf. 498; on the other hand, doves, being *feræ naturæ*, are not subject of larceny, unless they are in the owner's custody: *Commonwealth v. Chace*, 9 Pick. 15; S. C., 19 Am. Dec. 348; fish are not, unless reclaimed, confined, or dead, and valuable for food or otherwise: *State v. Krider*, 78 N. C. 481; ferrets, though tame and salable, are not: *Rex v. Searing*, Russ. & R. 350; a marten caught in a trap in the woods while it remains in the trap is not: *Norton v. Ladd*, 5 N. H. 203; S. C., 20 Am. Dec. 573; but an otter, if confined or dead, is the subject of larceny: *State v. House*, 65 N. C. 315; S. C., 6 Am. Rep. 744; and oysters are the subject of larceny: *State v. Tayler*, 13 R. I. 41; *State v. Taylor*, 27 N. J. L. 117. The subject of the larceny of animals is discussed in an article in 24 Alb. L. J. 244.

WHEN A PARTY MAY BE GUILTY OF LARCENY IN STEALING HIS OWN PROPERTY.—A party can not be convicted of stealing his own property, it

being in his possession: *People v. Mackinley*, 9 Cal. 250; but a general owner may be convicted of stealing from a special owner or bailee: *State v. McCoy*, 17 Rep., N. S., 474; and a part owner may be convicted of stealing it from the person in whose custody it was, and who was accountable for it: *Regina v. Burgess*, L. & C. 299; *Rex v. Bramley*, Russ. & R. 478; *Regina v. Webster*, L. & C. 77; and it is larceny for the owner to remove it clandestinely from the rightful possession of one who has a valid lien upon it: *People v. Long*, 50 Mich. 249; as to take a watch from a bailee, with whom it has been left for repairs, with the intent to deprive him of the value of his repairs: *State v. Stephens*, 32 Tex. 155; and a pledgor obtaining possession of the thing pledged by deception and false pretenses, and with the felonious intention of depriving the pledgee of his security, is guilty of larceny: *Bruce v. Rose*, 57 Iowa, 651; S. C., 13 Rep., N. S., 683; 11 N. W. Rep. 629; and if a man steal his own property with the intent to charge another with it, it is larceny: *Palmer v. People*, 10 Wend. 165; S. C., 25 Am. Dec. 551; as if he intend to charge his bailee with it: *People v. Stone*, 16 Cal. 369; *People v. Thompson*, 34 Id. 671; and if he steal his own goods from his bailee, not with the intention of charging the bailee, but to defraud the king, it is larceny, if the bailee had an interest in the possession and could have withheld it: *Rex v. Wilkinson*, Russ. & R. 470; but in Pennsylvania it was held that a man could not be indicted for larceny of his own property from his bailee: *Commonwealth v. Tobin*, 2 Brews. 570. If a prisoner had assigned his goods by deed to trustees for the benefit of creditors, and the trustees took no possession of them, but the prisoner remained in possession, his removal of the goods with intent to deprive the creditors of them is not larceny: *Regina v. Pratt*, Dears. C. C. 360.

OBTAINING GOODS BY FALSE PRETENSES AND REPRESENTATIONS.—If the ownership of the property is parted with, the defendant is not guilty of larceny although the owner was induced to part with the goods by means of fraudulent representations: *Rex v. Adams*, Russ. & R. 225; *Lewer v. Commonwealth*, 15 Serg. & R. 93; *Kellogg v. State*, 26 Ohio St. 15; *Pitts v. State*, 5 Tex. App. 122. The offense, in such a case, would be obtaining goods by false pretenses, but not larceny. If, however, the owner by means of the false pretenses or representations parted with the possession merely and not with the title, and the wrong-doer appropriate the property without his consent, the offense is larceny: *Pitts v. State*, 5 Id. 122; *Loomis v. People*, 67 N. Y. 322; S. C., 23 Am. Rep. 123; *State v. Lindenthal*, 5 Rich. 237; *Starkie v. Commonwealth*, 7 Leigh, 752; *Rex v. Aickles*, 1 Leach, 294; *Regina v. Brown*, Dears. C. C. 616; *Wilson v. State*, 1 Port. 118. It was held in *Berg v. State*, 2 Tex. App. 148, that if it appear that the taking was lawful, but was obtained by false pretenses and with the intent to deprive the owner of the value of his property and appropriate it to his own use, the proof must show an appropriation by the taker; and see also *Hornbeck v. State*, 10 Id. 408, to the same effect. The false pretenses, either with or without other causes, must have had a decisive influence upon the mind of the owner so that without their influence he would not have parted with his property: *Fay v. Commonwealth*, 28 Gratt. 912. If the defendant obtain possession of the property from the servant of the owner by means of false pretenses, with a felonious intent to appropriate it, he is guilty of larceny: *Regina v. State*, 2 Car. & Kir. 988; *Regina v. Sheppard*, 9 Car. & P. 121. And if the prisoner obtain letters from a post-office by falsely representing that he was sent for them by the persons to whom they were addressed, he is guilty of larceny: *Regina v. Gillings*, 1 F. & F. 36. And a party is guilty if he

obtain possession of a certificate and field-notes, the property of another, from a surveyor, upon the pretense of an interest in the land, and a desire to return them to the general land office for a patent, but really with the fraudulent intent to convert them or to suffer the time for their return to expire, and then to appropriate the land by another certificate or pre-emption claim: *State v. Vickery*, 19 Tex. 326. See further on this subject the heads "larceny by hirers or borrowers of chattels," and "larceny by the purchaser of goods," *post*.

OBTAINING PROPERTY BY TRICKS OR ARTIFICES.—Obtaining the possession of property by tricks or artifices is larceny: *Regina v. Hazell*, 11 Cox C. C. 597; *Huber v. State*, 57 Ind. 341; *Regina v. Johnson*, 2 Den. C. C. 310; *Kelly v. People*, 13 N. Y. Supreme Ct. 509; *Miller v. Commonwealth*, 78 Ky. 15; S. C., 39 Am. Rep. 194; *Smith v. People*, 53 N. Y. 111; S. C., 13 Am. Rep. 474; but if the owner is deceived into a surrender of the title as well as the possession, the offense is getting the property by means of false pretenses, and not larceny: *Smith v. People*, *supra*; *Miller v. Commonwealth*, *supra*; *Kelly v. People*, *supra*.

Obtaining property by means of a gaming trick has been held larceny: *Defrese v. State*, 3 Heisk. 53; S. C., 8 Am. Rep. 1; *Rex v. Dobson*, Russ. & R. 413; but see, *contra*, *Regina v. Wilson*, 8 Car. & P. 111; *Rex v. Nicholson*, 2 Leach, 610. It was held in *Hall v. State*, 6 Baxt. 522, that if a person was fraudulently induced to play at cards when he had no chance to win, and losing, the offense was larceny, the game or trick being the device to get possession of the money. A gypsy obtaining money and goods under the pretense of practicing witchcraft, and without any intention to return them, is guilty of larceny: *Regina v. Bunce*, 1 F. & F. 523.

LARCENY BY FALSELY PERSONATING ANOTHER PERSON.—One who falsely personates another, and in such assumed character receives property intended for such other person, is guilty of larceny: *State v. Brown*, 25 Iowa, 561; *Rex v. Longstreet*, 1 Moo. C. C. 137; *Commonwealth v. Collins*, 12 Allen, 181; *Rex v. Wilkins*, 2 East P. C. 673; *Commonwealth v. Lawless*, 103 Mass. 425; but such an offense was held not to be larceny under the Indiana statute: *Williams v. State*, 49 Ind. 367, although it was said it might be the offense of obtaining money by false pretenses.

LARCENY IN MAKING CHANGE.—If a bill is put into a person's hands to make change, and he appropriate it, the offense is larceny: *Farrell v. People*, 16 Ill. 506. Thus where the prosecutor gave the defendant, a bar-keeper, a fifty-dollar bill to take out ten cents for soda, and the prisoner put a few coppers on the counter, and when the prosecutor asked for change, put him out of doors and kept the money, he is guilty of larceny: *Hildebrand v. People*, 56 N. Y. 394; S. C., 15 Am. Rep. 435; and where the prisoner, a saloon-keeper, received from R. a twenty-dollar piece to pay for twenty-five cents' worth of liquor, and being unable to change it, went out, at R.'s request, to get change, and lost the money in gambling, he is guilty of larceny: *People v. Special Sessions Justices*, 90 N. Y. 12; S. C., 14 Rep., N. S., 695; 43 Am. Rep. 135, reversing S. C., 26 Hun, 537; see, however, *Regina v. Thomas*, 9 Car. & P. 741; and where a prisoner went to a shop and asked for change, and on being given it, ran off with it without leaving his own money, he is guilty of larceny: *Rex v. Williams*, 6 Id. 390.

OBTAINING MONEY BY THREATS OR EXTORTION.—Where A. acted as an auctioneer at a mock-auction, and knocked down the goods to B., who had not bid, and compelled her to take the property and pay the bid by means

of threats, his offense is larceny: *Regina v. McGrath*, L. R., 1 C. C., 205; and so is that of a knife-grinder who overcharges a lady for work done for her, and then compels her to pay the amount by frightening her: *Regina v. Lovell*, 44 L. T., N. S., 319; S. C., 24 Alb. L. J. 139; 21 Am. Law Reg., N. S., 705. So, also, if one having no cause of action sues out a writ for a fictitious demand, and gets possession of the property of another, which he converts to his own use, he is guilty of larceny: *Commonwealth v. Low*, Thach. Cr. Cas. 477; and the same is true if one, having a right of action, makes use of a process which he knows he has no right to adopt, to get property of his debtor, with intent to defraud him: Id. But where the defendant falsely represented himself as an officer, with a warrant for the arrest of a person on the charge of passing counterfeit money, and thus obtained the bank bills from the prosecutor as surety of the alleged criminal, the crime is that of obtaining money on false pretense, and not larceny: *Perkins v. State*, 65 Ind. 317.

APPROPRIATION BY ONE TO WHOM MONEY PAID OR GOODS DELIVERED BY MISTAKE.—Where one person paying money to another overpays him by mistake, and such person, knowing the mistake, conceals the fact and appropriates the money thus overpaid, he is guilty of larceny: *Wolfstein v. People*, 13 N. Y. Supreme Ct. 121; *State v. Ducker*, 8 Or. 394; S. C., 34 Am. Rep. 590; *Bailey v. State*, 58 Ala. 414; *Regina v. Middleton*, 12 Cox C. C. 260, 417. So, also, where a carman, having orders to deliver goods to a certain person, by mistake delivers them to another person, who appropriates them to his own use, the latter is guilty of larceny: *Regina v. Little*, 10 Id. 559.

MISCELLANEOUS INSTANCES OF LARCENY.—Pulling wool from the bodies of live sheep is larceny: *Rex v. Martin*, 1 Leach, 171; as is the killing and skinning another's cattle, with a fraudulent intent to sell and appropriate their hides: *McPhail v. State*, 9 Tex. App. 164; and the taking possession of another's hogs, with the unlawful intent to mark them with the defendant's own mark and to use them as his own: *Scott v. Harbor*, 18 Cal. 704; and taking fat from a loft of B., a tallow-melter, and trying to induce him to buy it himself: *Regina v. Hall*, 2 Car. & Kir. 947. And a lessee is guilty of larceny who asks to see a signed receipt for the rent and then refuses to return the receipt or pay the rent: *Regina v. Rodway*, 9 Id. 784; so is the obligor of a bond who asks the obligee to be allowed to inspect it, and immediately puts it into the fire and burns it, on it being handed to him: *Dignocity v. State*, 17 Tex. 521. A man driving a flock of sheep is guilty, if he drove away a lamb belonging to another, without knowing that he did so, and on discovering the lamb, sold it: *Regina v. Riley*, Dears. C. C. 149; and taking money out of the open hand of a person who is standing on the street counting it is larceny, if the person taking it refuse to return it: *Johnson v. Commonwealth*, 24 Gratt. 555. It does not change the nature of a larceny from the person that the person plundered was asleep: *Hall v. People*, 30 Mich. 717. One who obtains goods on a forged order is not guilty of larceny: *Regina v. Adams*, 1 Den. C. C. 38.

LARCENY BY PERSONS IN PECULIAR RELATIONS.—**1. Larceny by Bailees Generally.**—It was said in *Wright v. Lindsay*, 20 Ala. 428, that a bailee could not be guilty of larceny at the common law by a fraudulent conversion of the deposit. But it has been held that if a bailee convert property to his own use with felonious intent, he is guilty of the offense: *People v. Poggi*, 19 Cal. 600; *State v. White*, 2 Tyler, 352; *Welsh v. People*, 17 Ill. 339; as where he obtains the possession with the intent to convert to his own use: *People v. Smith*, 23 Cal. 280; *Elliott v. Commonwealth*, 12 Bush, 176; but some act inconsistent with the bailment must be proved: *Regina v. Jackson*, 9

Cox C. C. 505; and it has been held that the felonious intent must exist when he acquired possession of the property: *State v. Braden*, 2 Overt. 68; *Regina v. Jones*, Car. & M. 611; *Rex v. Banks*, Russ. & R. 441. For the purpose of convenience, we will treat of the different classes of bailees separately.

a. *Agisters*.—In *Regina v. Leppard*, 4 F. & F. 51, it was held that an agister selling sheep without authority, and without any reason to suppose he had authority, was guilty of larceny, otherwise not. But in *Rex v. Smith*, 1 Moo. C. C. 473, it was held that a person who received a horse to be agisted and selling it was not guilty of larceny, as the prosecutor had parted with his possession.

b. *Hirers or Borrowers of Chattels*.—If a defendant obtain possession of a chattel under the false pretense of hiring or borrowing, but with the felonious intention of converting it to his own use, he is guilty of larceny: *Starkie v. Commonwealth*, 7 Leigh, 752; *Rex v. Semple*, 1 Leach, 420; *Rex v. Pear*, Id. 212; *Rex v. Tunnard*, 2 East P. C. 687; *State v. Humphrey*, 32 Vt. 569; *Commonwealth v. Smith*, 1 Penn. L. J. 400; *State v. Williams*, 35 Mo. 229; *Norton v. State*, 4 Id. 461; *Quitnow v. State*, 1 Tex. App. 65; S. C., 28 Am. Rep. 397; *White v. State*, 11 Tex. 769 (see, *contra*, *Felter v. State*, 9 Yerg. 397); although the hiring was for no definite time; *Rex v. Semple*, *supra*; and although no actual conversion by a sale or otherwise is proved: *Regina v. Johnson*, 4 Cox C. C. 82; and it has been held that if the felonious intention is subsequently conceived, the defendant is nevertheless guilty: *State v. Coombe*, 55 Me. 477; *Norton v. State*, 4 Mo. 461; but the decisions generally follow the rule that the felonious intent must exist at the time of obtaining possession: *Hill v. State*, 28 Alb. L. J. 37; S. C., 15 Rep., N. S., 669; 12 Am. Law Rec. 123; *Regina v. Cole*, 2 Cox C. C. 340; *Regina v. Brooks*, 8 Car. & P. 295; *Regina v. Jones*, Car. & M. 611; *Commonwealth v. Smith*, 1 Penn. L. J. 400. In *Regina v. Brooks*, *supra*, it was held there must not only have been an original intention to convert, but a subsequent actual conversion, and that a mere agreement to accept a sum offered for the goods was not such a conversion, if the party who made the offer did not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell were removed.

c. *Drovers of Cattle and Persons not Common Carriers or Servants Carrying Goods for Owner*.—If a drover of cattle or sheep employed to drive the cattle to a particular place sell the cattle or sheep, and convert the cattle or sheep, he is guilty of larceny: *Regina v. Goodbody*, 8 Car. & P. 665; *Rex v. Stock*, 1 Moo. C. C. 87; *Regina v. Jackson*, 2 Id. 32; *Rex v. McNamee*, 1 Id. 368. See, however, *Regina v. Hey*, 3 Cox C. C. 582. And in *Regina v. Jackson*, *supra*, this was held so, although the intent was not conceived until afterwards. And if an owner employ a person to take goods to a particular place and show them to a customer, and the person employed sell them for his own benefit, he is guilty of the offense: *Regina v. Harvey*, 9 Car. & P. 353; as is a person who is requested to put a letter in the post-office, and told that it contains money, if he breaks the seal and abstracts the money: *Rex v. Jones*, 7 Id. 151; or opens a package of goods intrusted to his care, and disposes of them to his own use: *State v. Fairclough*, 29 Conn. 47; or receives a parcel containing notes to take to a coach-office, and abstracts the notes on the way: *Regina v. Jones*, 9 Car. & P. 38; and one who is employed to take a barge to a certain place and is paid a sum to pay tonnage dues in addition to his wages, and appropriates the surplus remaining after paying the dues to his own use, is guilty: *Regina v. Goode*, Car. & M. 582.

d. *Where Property is Left with One to Perform Labor upon It.*—If property is left with one who is to perform certain labor upon it, he is not guilty of larceny, unless at the time he received the goods he entertained the felonious intention of appropriating them; a subsequently conceived intention and conversion will not make him guilty of conversion: *Abrams v. People*, 13 N. Y. Supreme Ct. 491; *Regina v. Thistle*, 3 Cox C. C. 573; *Regina v. Evans*, Car. & M. 632; nor would he be where he kept it as security for the amount alleged to be due on a dispute as to its amount: *Regina v. Wade*, 11 Cox C. C. 549; but where a bureau was delivered to a carpenter for repairs, and he discovered a secret drawer, which he unnecessarily broke open and appropriated money discovered there, he is guilty of larceny unless he intended to return the money: *Cartwright v. Green*, 2 Leach, 952. And a miller receiving wheat to grind is guilty if he fraudulently retain part of the wheat and return a mixture of barilla and plaster of Paris: *Commonwealth v. Jones*, 1 Pick. 375.

e. *Other Instances of Larceny by Bailees.*—A bailee of a deed fraudulently converting it to his own use is guilty of larceny: *Regina v. Tomkinson*, 24 Alb. L. J. 337; so is a warehouseman with whom a bag of wheat has been left for safe-keeping who takes all the wheat out of the bag and disposes of it: *Rex v. Brazier*, Russ. & R. 337, and one who has the care and oversight of articles in a house, and who takes such articles: *Gill v. Bright*, 6 T. B. Mon. 130, and a hostler who has care and charge of a horse, and who takes him with intent to convert him: *State v. Self*, 1 Bay, 242, and one with whom a trunk is left, who takes money from it: *Robinson v. State*, 1 Coldw. 120. The prisoner, a dealer in jewelry, sent a memorandum order to K., another jeweler, for six pairs of gold bracelets. The order was designed and understood to be an application for articles to enable the prisoner to sell some of them to a customer, the ones remaining unsold and the money for those sold to be returned; the prisoner appropriated them, and he was held guilty of larceny: *Weyman v. People*, 6 Thomp. & C. 697.

COMMON CARRIERS.—Separation and conversion to his own use by a common carrier of some of the property he was employed to carry renders him guilty of larceny: *Nichols v. People*, 17 N. Y. 114; *Commonwealth v. Brown*, 4 Mass. 580; *Rex v. Howell*, 7 Car. & P. 325; but there must be a breaking of the bulk to make him liable: *Regina v. Cornish*, Dears. C. C. 425; *Rex v. Madox*, Russ. & R. 92; *Rex v. Prailey*, 5 Car. & P. 533; thus where A. had consigned three trusses of hay to B., and had sent them by the prisoner's cart, and the prisoner took away one of the trusses, and it was found in his stable, but not broken up, it was held that there was no larceny: *Rex v. Prailey, supra*.

CROPPERS OR CO-OWNERS.—A cropper whose contract with the landlord did not entitle the latter to the exclusive possession of the crop, and who without the landlord's consent took part of the crop before it was divided, is not guilty of larceny: *Bell v. State*, 7 Tex. App. 25, and it was held that an indictment would not lie against a cropper for secretly appropriating the crop to his own use, even with a felonious intent, in *State v. Copeland*, 86 N. C. 691; S. C., 27 Alb. L. J. 98; but if the actual possession of the cropper has terminated by a delivery to the landlord, his secret appropriation of the crop to his own use is larceny: *State v. Webb*, 87 N. C. 558; and if the crop was to be the landlord's until certain advances made to the cropper had been paid, and the advances were not paid, a clandestine taking of the property by the cropper is larceny: *Connell v. State*, 2 Tex. App. 422. Ordinarily a

joint tenant of a crop can not be guilty of the larceny of the crop: *Bonham v. State*, 65 Ala. 456; *Kirksey v. Fife*, 29 Id. 206. But if one tenant abandons the crop, he may be guilty of the subsequent larceny of it: *Bonham v. State*, *supra*. Where one got staves on the land of another upon a contract to have half for getting them off, it was held that while they remained on the land undivided, the manufacturer was neither tenant in common with the owner of the land nor his bailee, and that consequently either he or any person with his connivance might be guilty of larceny in taking them: *State v. Jones*, 2 Dev. & B. L. 544.

HUSBAND OR WIFE—EFFECT OF CONSENT OF EITHER TO TAKING.—Ordinarily a husband and wife can not commit larceny of each other's goods: *State v. Parker*, 28 Alb. L. J. 423; *Regina v. Avery*, Bell C. C. 153; and a stealing by a wife of a member of a friendly society of money belonging to the society and deposited in a box in his custody, and kept locked by the stewards, is not larceny: *Rex v. Willis*, 1 Moo. C. C. 375; and a prisoner can not be guilty of stealing goods if it appear that he could not otherwise get possession of them than by a delivery of the goods by the prosecutor's wife: *Rex v. Harrison*, 1 Leach, 47; nor can a stranger who does no more than merely assist her in taking the goods: *Regina v. Avery*, *supra*; but a taking of the husband's property by the wife and another may make the man guilty: *Lamphier v. State*, 70 Ind. 317; *Rex v. Tolfree*, 1 Moo. C. C. 243. And a man who commits adultery with the wife, elopes with her, and takes the husband's property, is guilty: *People v. Schuyler*, 6 Cow. 572; *Regina v. Berry*, Bell C. C. 95; *Regina v. Harrison*, 12 Cox C. C. 19; *Regina v. Mutter*, L. & C. 511; *Regina v. Thompson*, 1 Den. C. C. 549; see also *Regina v. Featherstone*, Dears. C. C. 369; and the wife was held also to be guilty of larceny in such a case: *Regina v. Tollett*, Car. & M. 112; but if an adulterer, eloping with the wife, assists in carrying away the necessary wearing apparel of the wife only, he is not guilty of larceny: *Regina v. Fitch*, Dears. & B. C. C. 187.

FINDERS OF LOST GOODS OR ESTRAYS.—In order to make the finder of lost property guilty of larceny, he must have a felonious intent to appropriate the property at the time of the finding: *State v. Levy*, 23 Minn. 104; S. C. 23 Am. Rep. 678; *Regina v. Matthews*, 28 L. T., N. S., 645; *Regina v. Preston*, 2 Den. C. C. 353; *Reed v. State*, 8 Tex. App. 40; S. C., 34 Am. Rep. 732; *People v. Anderson*, 14 Johns. 294; S. C., 7 Am. Dec. 462; *State v. Conway*, 18 Mo. 321; *Starck v. State*, 63 Ind. 285; S. C., 30 Am. Rep. 214; and he must also know or have reasonable means of knowing who the owner was: *State v. Conway*, 18 Mo. 321; *Reed v. State*, 8 Tex. App. 40; S. C., 34 Am. Rep. 732; *Tyler v. People*, Breese, 293; S. C., 12 Am. Dec. 176; *Woolfington v. State*, 53 Ind. 343; *State v. Levy*, 23 Minn. 104; S. C., 23 Am. Rep. 678; *Regina v. Deares*, 11 Cox C. C. 227; *State v. Taylor*, 25 Iowa, 273; *State v. Dean*, 49 Id. 73; S. C., 31 Am. Rep. 143; *Tanner's Case*, 14 Gratt. 635; *People v. Cogdell*, 1 Hill (N. Y.), 94; S. C., 37 Am. Dec. 297; *State v. Roper*, 3 Dev. L. 473; S. C., 24 Am. Dec. 268; *Regina v. Christopher*, Bell C. C. 27; *Regina v. Mole*, 1 Car. & Kir. 417; *Regina v. Glyde*, 37 L. J. M. C. 107; but if at the time of finding the property the finder knew who the owner was or had reasonable means of knowing, and appropriated and converted the property to his own use, he is guilty of larceny: *State v. Swayze*, 2 West Coast Rep. 669; *State v. Ferguson*, 2 McMull. 502; *Baker v. State*, 29 Ohio St. 184; S. C., 23 Am. Rep. 731; *Brooks v. State*, 35 Ohio St. 46; *People v. Swan*, 1 Park. Cr. C. 9; *State v. Clifford*, 14 Nev. 72; S. C., 33 Am. Rep. 526; *Commonwealth v. Titus*, 116

Mass. 42; S. C., 47 Am. Rep. 138; *Bailey v. State*, 52 Ind. 462; S. C., 21 Am. Rep. 182; *Lane v. People*, 10 Ill. 305; *State v. Weston*, 9 Conn. 527; *Griggs v. State*, 58 Ala. 425; S. C., 29 Am. Rep. 762; *Reed v. State*, 8 Tex. App. 40; S. C., 34 Am. Rep. 732; *Pyland v. State*, 4 Sneed, 357; *Regina v. Moore*, L. & C. I. It was held to be the duty of the finder to advertise them, and his neglect and concealment or private conversion made him guilty of larceny, in *State v. Jenkins*, 2 Tyler, 379; and driving cattle astray upon the highway to market and selling them was held larceny in *People v. Kaatz*, 3 Park. Cr. C. 129; and see *State v. Martin*, 28 Mo. 530; and taking a horse astray upon the owner's land and concealing him with the hope of a reward or of inducing the owner to sell him for less than his value is larceny: *Commonwealth v. Mason*, 105 Mass. 163; S. C., 7 Am. Rep. 507; and a finder concealing a chattel with the intention of appropriating it and only returning it because of a reward offered was held guilty in *Regina v. Peters*, 1 Car. & Kir. 245; see, however, *Regina v. Yorke*, 2 Id. 841. But it was held in *Porter v. State*, Mart. & Y. 226, that if a finder of bank notes convert them to his own use with full knowledge of the owner, it is not larceny, there being no trespass committed in obtaining possession. This case, however, is opposed to the general rule. Where the property is found by a servant in her master's dwelling, and she conceals and carries away the same, she is guilty of larceny: *Regina v. Kerr*, 8 Car. & P. 176; especially if she should deny having found the property on being questioned in relation to it: *State v. Cummings*, 33 Conn. 280.

Property which is accidentally left in store, the owner knowing where it was, is not lost property; and the proprietor is guilty of larceny if he appropriates it: *State v. McCann*, 19 Mo. 249; *Lawrence v. State*, 1 Humph. 228; S. C., 34 Am. Dec. 644; *Regina v. West*, Dears. C. C. 402; and the same is true where property is left in a hackney-coach, and the hackman, instead of restoring it, appropriates it: *Rex v. Wynne*, 1 Leach, 413; *Rex v. Sears*, Id. 415, note. And where property was left in a railroad car by a passenger, and found there by a servant of the company, such servant is guilty of larceny if he converts it instead of taking it to the station or the superior officer: *Regina v. Pierce*, 6 Cox C. C. 117.

LARCENY BY SERVANT.—A servant who has the care and custody of his master's goods is guilty of larceny if he appropriates them to his own use: *Rex v. Harding*, Russ. & R. 125; *Rex v. Chipchase*, 2 Leach, 699; *Regina v. Reid*, Dears. C. C. 257; *Regina v. Hawkins*, 4 Cox C. C. 224; *Regina v. Roberts*, 3 Id. 74; *United States v. Clew*, 4 Wash. 700; *Walker's Case*, 8 Leigh, 743; *Commonwealth v. Maher*, 11 Phila. 425; *State v. Davis*, 63 N. C. 556; *People v. Wood*, 2 Park. Cr. C. 22; *Powell v. State*, 34 Ark. 693; *State v. Schingen*, 20 Wis. 74; *Marcus v. State*, 26 Ind. 101; and if one servant obtain the possession of goods from another servant, who was instructed to deliver only on the order of the employer, by fraudulent statements, he is guilty of larceny: *Regina v. Robins*, Dears. C. C. 418; and if a servant hands over his master's property by way of gift, he is as guilty as if he sold it for his own benefit: *Regina v. White*, 9 Car. & P. 344. In *Ennis v. State*, 3 Iowa, 67, it was held that the appropriation by a servant of a span of horses intrusted to his care was embezzlement, and not larceny; and in *Commonwealth v. King*, 9 Cush. 284, it was held that an appropriation by a servant of bank bills, obtained on a check of his master's, was embezzlement, and not larceny; and in Indiana, under statute, the same rule prevails: *Jones v. State*, 59 Ind. 229; but a majority of the cases hold that appropriation by a servant of money,

checks, or bank notes belonging to the master is larceny: *Commonwealth v. Barry*, 116 Mass. 1; *Regina v. Beaman*, 1 Car. & M. 595; *Regina v. Low*, 10 Cox C. C. 168; *Regina v. Thompson*, L. & C. 233; *Regina v. Cooke*, L. R., 1 C. C., 295; *Regina v. Heath*, 2 Moo. C. C. 33; *Rex v. Metcalf*, 1 Id. 433; *Rex v. Hammon*, 4 Taunt. 304; *State v. Fann*, 65 N. C. 317; *Regina v. Butler*, 2 Car. & Kir. 340. The servant must intend to deprive the master of his property permanently, and to vest the property in the servant: *Regina v. Holloway*, 2 Id. 942; *Regina v. Poole*, 7 Cox C. C. 373; *Rex v. Webb*, 1 Moo. C. C. 431; *Regina v. Richards*, 1 Car. & Kir. 532. Conversion by an employee, hired to sell clothes around the country on commission, of the proceeds, was held larceny in *Regina v. Poyser*, 2 Den. C. C. 233; and see on this point *Snell v. State*, 50 Ga. 219, *State v. Leicham*, 41 Wis. 565. In *Lyon v. State*, 61 Ala. 224, it was held that the felonious intent must exist at the time the property comes into the servant's hand: *Lyon v. State*, Id.; but the contrary was held in *State v. Schingen*, 20 Wis. 74; see also the preceding head.

PURCHASERS OF GOODS, WHEN GUILTY OF LARCENY.—Where the purchaser of goods bargains to pay cash for them, and obtains possession of them and carries them away without the owner's consent, and without any intention of paying for them, he is guilty of larceny: *Rex v. Pratt*, 1 Moo. C. C. 250; *Regina v. Cohen*, 2 Den. C. C. 249; and the same would be true where the prisoner so carried away the goods, and there was no express bargain to pay cash for the goods, but by usage they ought to have been paid for before they were taken: *Rex v. Gilbert*, 1 Moo. C. C. 185; and where the mere possession of a chattel is fraudulently obtained from the vendor by the vendee *animo furandi*, a conversion of such chattel by the vendee is larceny: *United States v. Rodgers*, 1 Mackey, 419; but it has been held that where the goods were obtained by purchase, the vendee could not be guilty of larceny, although the purchase was brought about by means of fraud or false pretenses on the part of the vendor: *Mourey v. Walsh*, 8 Cow. 238; *Ross v. People*, 5 Hill, 294; *Rex v. Parker*, 2 Leach, 614. And the same was held in *Blunt v. Commonwealth*, 4 Leigh, 689; S. C., 26 Am. Dec. 341, where the prisoner obtained possession of a watch under the false pretense of paying cash for it, and then carried it away without the consent of the owner, the court saying it would not be larceny unless done with fraudulent intention. And *Rex v. Harvey*, 1 Leach, 467, held that if a horse was purchased and delivered to the buyer, there would be no felony on his part, although he immediately rode away with the horse without paying for it. But where the purchaser agreed to pay cash, and on the goods being unloaded at a place indicated by him, induced the seller to make out a receipt, which he obtained possession of, he is guilty, if he refuse to pay the money or restore the goods: *Regina v. Slowly*, 27 L. T., N. S., 803. And where the goods were sent to the seller by a servant, who had instructions not to part with the goods without the money, the prisoner is guilty in taking the goods and paying for them in counterfeit money: *Regina v. Webb*, 5 Cox C. C. 154. In *Shippoly v. People*, 86 N. Y. 375; S. C., 40 Am. Rep. 551; 24 Alb. L. J. 374; 13 N. Y. Week. Dig. 82; 12 Rep., N. S., 795, the prisoner negotiated with H., a merchant, for the purchase of the goods in question; the terms were cash; upon being asked if he would wait and have his bill made out and pay for them, he said he would send an expressman for the goods and they could be sent C. O. D., and he would pay the expressman. Soon after, S., a man in the employ of the prisoner, called at H.'s store, said he was an expressman, and had come for the goods; they were given him, with a bill, and instructions to collect on delivery; the prisoner received the goods from S., and sent him with a check to

the store of H., which was left during H.'s absence; the check was worthless; the prisoner refused either to pay or to return the goods; he was held guilty of larceny.

MISCELLANEOUS INSTANCES.—A sheriff is guilty of larceny in converting money collected by him for taxes: *State v. Dale*, 8 Or. 229; and so is a public hall keeper appointed by the justices, who carries away the contents of the hall: *Regina v. Window*, 5 Cox C. C. 346; and a letter-carrier who retained a letter containing money, with the intention of stealing it: *Regina v. Poyn-
ton*, 9 Id. 249; and the broker of a bank, who appropriates a check given him to buy silver with: *People v. Abbott*, 53 Cal. 284; S. C., 31 Am. Rep. 59; and where the personal property of a defendant in execution was purchased by a friend, who permitted him to use and retain it, and he appropriated it, he is guilty of larceny: *Commonwealth v. Chatham*, 50 Pa. St. 181.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

COWLES v. KIDDER.

[24 NEW HAMPSHIRE, 364.]

EVERY PROPRIETOR UPON EACH BANK OF RIVER is entitled to the land covered with water in front of his bank to the middle of the stream, has a right to use the water flowing over it in its natural current, without diminution or obstruction, and it is immaterial whether the party be a proprietor above or below on the river.

ERECTING DAM UPON STREAM, BELOW POINT WHERE PLAINTIFF MAINTAINS MILL, in such a manner as to throw the water back upon plaintiff's land and obstruct the use of his mill, is an injury for which he is entitled to demand redress. In such a case the law will presume damage.

PAROL LICENSE, TO BE EXERCISED UPON LANDS OF ANOTHER, is a mere personal trust and confidence, and is not assignable; and although it may be binding between the parties, it will not pass to a purchaser. It is not an easement carrying an interest in the land; it is a mere permission to one to do an act, and does not confer an authority upon others to do such act or exercise the same license.

PAROL LICENSE TO BUILD DAM EXPIRES with the decay of the dam, and gives no right to repair or re-erect it.

ERCTION OF DAM ACROSS STREAM in such a manner as to throw the water back upon plaintiff's land, being a wrongful act, should render the defendant liable for any injury resulting from its erection and maintenance, such as stopping a floe of ice, and causing it to interfere with plaintiff's mill.

CASE for erecting a dam and causing water to flow back upon the land of plaintiff. The opinion states the necessary facts.

Perley and Prentiss, for the plaintiffs.

Cushing and Snow, for the defendants.

By Court, Woods, J. The mills of the plaintiffs were situated on Rock island, in Sugar river, in Claremont, near the north end of the island, and were erected and used by the grantors of the plaintiffs for a period of more than twenty years prior to the year 1836; and the mills of the defendants were erected in 1836 by their grantors, and were located about fifteen rods below the plaintiffs' mills. It is not, however, necessary to consider any question of adverse possession arising in the case, nor to settle the questions of construction of the title deeds raised and discussed at the bar. For the purposes of the opinion, the parties may well be regarded as holding the ordinary rights of riparian proprietors. The case will not admit of a view more favorable to the defendants. In December, 1848, the stream between the mills of the plaintiffs and the dam of the defendants became obstructed by ice, so much so as to throw back the water upon the land and mills of the plaintiffs, and so as to prevent the operation of the mills. "This obstruction," in the language of the case, "was caused by the defendants' dam stopping the water and ice and throwing them back." It is quite clear that the plaintiffs, being the owners of the land at the place of their mills, were entitled to an unobstructed flow through it and from it. In the language of Story, J., "*Prima facie*, every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream, etc. In virtue of this ownership, he has a right to the use of the water flowing over it, in its natural current, without diminution or obstruction. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below, in the course of the river, the right being common to all the proprietors on the river. No one has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above:" *Tyler v. Wilkinson*, 4 Mason, 400. In *Gilman v. Tilton*, 5 N. H. 232, Richardson, C. J., says: "In general, every man has a right to the use of the water flowing in a stream through his land; and if any one divert the water from its natural channel, or throw it back, so as to deprive him of the use of it, the law will give him redress. But one man may acquire, by grant, a right to throw the water back upon the land of another, and long usage may be evidence of such a grant. It is, however, well settled, that a man acquires no such right by merely being the first to make use of

the water." The language of Lord Tenterden, in *Mason v. Hill*, 3 Barn. & Adol. 304, is thus: "Without the consent of the proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above." The case of *Davis v. Fuller*, 12 Vt. 178 [36 Am. Dec. 334], is much like the present case. By the verdict of the jury, it appeared in that case that the plaintiff owned a certain lot of land, across which flowed a river, on which he had a grist-mill. The defendant owned land on the stream below, where he had erected a dam, to carry a saw-mill, but had erected it no higher than was necessary for that purpose. This dam occasioned accumulations of ice, which at times caused the water to flow back upon the plaintiff's land, and obstructed his mill, to his injury. In reference to those facts, Collamer, J., remarks: "The owner of land has rights to the use of a private stream running over his land, peculiar to him as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this he can not be deprived by the mere use or appropriation by another." In the case of *Woodman v. Tufis*, 9 N. H. 88, which was case for erecting and continuing a dam across Blackwater river, and overflowing the land of the plaintiff, situated above said dam, the court decided that if the defendant, without right, maintained a dam so high as to overflow the land of the plaintiff, the presumption of law was that the act was a damage, and no special damage need be shown in order to maintain the action. Upon the doctrine of the authorities cited, we think it is clear that the plaintiffs have sustained a damage by reason of the erection and maintenance of the dam, for which they are entitled to redress, unless, upon the other grounds relied upon, the result may be changed.

The defendants rely upon an alleged license from one Wheeler, a prior owner of the plaintiffs' mills, to the grantors of the defendants, to erect their dam as a justification of the acts complained of in this case. But that fact, if shown, could furnish no answer to the plaintiffs' action. It is well settled that a parol license, to be exercised upon the land of another, is a mere personal trust and confidence, and is not assignable, and that although it may be binding as between the parties, it will not pass to a purchaser. It is not an easement, carrying an interest in the land; it is a mere permission to one to do an act, and

does not confer an authority upon others to do such act or exercise the same license. In *Cook v. Stearns*, 11 Mass. 538, it is holden that such a license is countermandable, and that the transferring of the land by the owner to another, or even leasing it without any reservation, would, of itself, be a countermand or revocation of the license. The same doctrine is recognized in *Harris v. Gillingham*, 6 N. H. 9 [23 Am. Dec. 701]. And in the recent case of *Carleton v. Redington*, 21 Id. 291, the doctrine is distinctly held, that such a license is merely a personal privilege to be enjoyed by the person to whom it is granted, and creates no interest in land, and is not assignable, and that a conveyance by him who exercises the license will confer no right upon another to exercise the same license. The defendants in this case set up claim to no other license than such as they may have derived from their grantors, to whom, as they allege, the former owners of the plaintiffs' mills gave the license to erect the dam now owned by the defendants, and thereby to throw back the water upon the plaintiffs' land and mills. It is apparent according to the authorities, that, upon two grounds, the license can not avail the defendants. In the first place, the conveyance of the mills to the plaintiffs, by those who gave the license, was, of itself, a revocation of the license, and terminated it; and in the second place, if such were not the effect of that conveyance, still the license, being a personal privilege, as we have seen, is not assignable, and the conveyance of the dam and other privileges to the defendants, by those to whom the license was granted, did not confer upon them any privilege or right in the license itself, or in its exercise.

There is still another distinct ground, one which, according to the case, was assumed by the plaintiffs at the trial, upon which the license relied on by the defendants must fail to furnish an answer to the plaintiffs' action. At the time of the defendants' purchase, the wing dam had become decayed, and was so out of repair that it was insufficient to stop the water, and the wing dam was afterwards repaired by the defendants, although the plaintiffs forbade the repairs; and the case specially finds that the "wing dam so repaired was a part of the dam that caused the obstructions complained of." Now, in the case of *Carleton v. Redington*, before referred to, it is distinctly settled that a license to erect a dam and flow the lands of another terminates with the decay of the dam, and gives no right, when the dam has become decayed and ruinous, to re-erect or repair it, and flow the land again. Here is superadded to the decay of

the dam an express revocation of the license to repair, if such license before existed. The act of the defendants in making the repairs was, therefore, clearly unauthorized and wrongful, and the injury to the plaintiffs was the direct and necessary consequence of it. The one was caused by the other.

A further position assumed in the defense, in answer to the right of recovery on the part of the plaintiffs, is, that the defendants have a right to the use of the water on their own lands if they do not flow the plaintiffs' land, and are not liable for accidental damages occasioned in times of freshet, ice times, etc. The facts reported by the judge who tried this cause show no such case of accidental damages as is here assumed, and no unusual state of the water as in the case of a freshet, or an extraordinary ice time. In reference to this subject the case merely finds that the stream between the mills of the plaintiffs and the dam of the defendants "became obstructed with ice, so much so as to stop the mills and require the channel to be cut out." The case, thus far, clearly furnishes no evidence of any sudden and accidental accumulation of ice by some extraordinary means, or any state of the water which is not usual and ordinary, and always to be expected in certain seasons in each and every year. Accumulations of ice in our streams, in this climate, are as certain as the annual return of winter. Whether, therefore, an accidental accumulation of ice causing damage to the plaintiffs would or would not give them a cause of action against the defendants need not now be determined. Whether the defendants would or would not be answerable for a damage, the result of accident, which they could not foresee and prevent, and not being the result or consequence of any wrongful act of their own, we are not called upon to decide. The case before us finds that "the obstruction was caused by the defendants' dam stopping the water and ice, and throwing them back." This was, then, simply the ordinary case of the erection and maintenance of a dam, either higher or otherwise, of a character such as the defendants had no lawful right to maintain, and by means of which the ice and water were accumulated and thrown back upon the mills of the plaintiffs in a manner to occasion a damage. The idea that the damage resulted from accident is most distinctly negatived by the facts reported in the case. On the other hand, it is distinctly shown to have been caused by the dam in its necessary and usual operation upon the water, causing the water and ice to be thrown back upon the mills. And we have already seen that the defendants in this litigation had no

greater rights than those which belong ordinarily to riparian proprietors, and that consequently they had no right to throw back the water upon the lands and mills of the mill owners above, in a manner causing these damages. It has never yet been held, we think, that a riparian proprietor, as such, has the right, by any means, to cause the water in the stream to be thrown back, and to overflow the lands of the proprietor above, upon the stream, to his damage. And we have already seen that where the water is thus thrown back upon and made to overflow the lands of the proprietor above, the law will presume a damage, and it is not necessary in such a case to prove any special damage sustained: *Woodman v. Tufts*, before cited.

This ground of defense we regard as being wholly unsupported. The defendants' counsel have called the attention of the court to the case of *Inhabitants of China v. Southwick*, 11 Me. 341, as sustaining this last ground of defense. That action was brought to recover damages for an injury done to the plaintiff's bridge, located at the head of a certain pond, by a head of water raised, as they alleged, by the defendant's dam, at the outlet of the pond. The jury were instructed that if the damage was occasioned by great rains, or by the violence of the wind, the defendant was not liable, provided the jury were also satisfied that the head of water raised by the defendant's dam was not high enough to flow the plaintiff's bridge, or to do damage thereto. A verdict was taken for the defendant. Weston, C. J., who delivered the judgment of the court, remarked that the jury had found that the head of water raised by the defendant's dam was not, at the period complained of, high enough to flow the plaintiff's bridge, or to do damage thereto. Its erection, then, was a lawful act—not in itself calculated to do any injury to the plaintiff. His loss was occasioned, as the jury have found, by great rains and by the violence of the wind. If the dam had not raised the water to a certain height, the rain or the wind superadded might not have done the damage. It may have been one of a series of causes to which the injury may be indirectly ascribed. It would be carrying the doctrine of liability to an unreasonable length, to run up a succession of causes, and hold each responsible for what followed, especially where the connection was casual and unexpected, as it was here, and where that which was attempted to be charged was in itself innocent. The law gives no encouragement to speculations of this sort. It rejects them at once. Hence the legal maxim, *Causa propinqua, non remota spectatur.*

That case was entirely distinguishable from the one under consideration. The erection and maintenance of the dam, in that case, were rightful acts, the same not being of a height to cause the water to flow back upon the bridge, or in any manner to injure it. Moreover, the dam was not found to have been the immediate cause of the injury, but, at most, only a cause remotely connected with the immediate cause of the injury. An extraordinary fall of rain, and the violence of the wind, forcing the water upon the bridge, were the immediate cause of its destruction. That case, then, fell within the principle which has been extensively applied, and to which reference was made in the opinion of the court, already cited.

But in the present case, as we have seen, the erection of the dam of the character of that of the defendants, being of a height and construction calculated to throw back the water of the stream upon the land and the mills of the plaintiffs above, beyond what the water would flow in its natural current, and having that effect, was, itself, an unlawful act, and would render the defendants answerable for any injury resulting from its erection and maintenance. In the case under consideration, the injury sustained by the plaintiffs is found to have been the immediate effect of the wrongful and unlawful act of the defendants; whilst in the case referred to in Maine it was not the result of any illegal or wrongful act of the party attempted to be charged, nor was any act of his, either rightful or wrongful, the immediate cause of the damage. A case differing so widely from the present in its material facts can furnish no safe and proper rule for the decision of it. Moreover, the reasoning of the learned chief justice who delivered the opinion of the court goes far to show that if the dam of the defendant in that case had been the immediate cause of the destruction of the bridge by reason of its erection to an unwarrantable height, amounting to a wrong on the part of the defendant, the defendant would have been answerable for the damage occasioned thereby. There must, therefore, be judgment on the verdict.

RIPARIAN PROPRIETOR HAS RIGHT TO USE OF STREAM flowing through the land for culinary, agricultural, and hydraulic purposes, without adulteration, diminution, or alteration, except from detention for lawful purposes, by other proprietors above him: *Plumleigh v. Dawson*, 41 Am. Dec. 199, and note; *Ten Eyck v. D. & R. Canal Co.*, 37 Id. 233, and note, where other cases in this series are collected: *Evans v. Merriweather*, 38 Id. 106, and note; *Wadsworth v. Tillotson*, 39 Id. 391, and note.

TITLE TO LAND BOUNDED BY NAVIGABLE RIVER EXTENDS TO MIDDLE OF STREAM, unless the conveyance indicates an intention to stop short of that: *McCullough v. Wall*, 53 Id. 715, and note.

RIPARIAN OWNER IS PROTECTED AGAINST FLOWING BACK OF WATER upon his land and mills, by the acts of another, by the common law: *Heath v. Williams*, 43 Am. Dec. 265. Every flowing back or throwing water upon the land of another is such an act as entitles the individual injured to his action: *Stout v. McAdams*, 33 Id. 441; *Omelvane v. Jagers*, 27 Id. 417; and such flowing the lands of another is *prima facie* evidence of damage: *Seidensparger v. Spear*, 35 Id. 234; *Plumleigh v. Dawson*, 41 Id. 199.

FOR FULL DISCUSSION OF LICENSE, and its nature and incidents, see note to *Ricker v. Kelly*, 10 Am. Dec. 38, note 40; *Emerson v. Fisk*, 19 Id. 206; *McKellip v. McIlhenny*, 28 Id. 711; *Seidensparger v. Spear*, 35 Id. 234; *Stephens v. Stephens*, 45 Id. 203, and notes to those cases.

FRENCH v. MARSTIN.

[24 NEW HAMPSHIRE, 440.]

GRANTOR OF RIGHT OF WAY TAKES IT SUBJECT TO ALL RESTRICTIONS which the grantor has imposed, and can use it for no other purpose than that provided in the grant.

WHENEVER INTENTION IS NECESSARY OR MATERIAL IT IS ISSUABLE like any other fact.

TWENTY YEARS' UNINTERRUPTED USE OF EASEMENT is *prima facie* evidence of right to use such easement.

IT WAS NECESSARY TO MAKE PROOF of a writing declared upon at common law; to set out its date and the parties to it. Its loss or destruction necessarily destroyed any claim under it, but at present an excuse for its non-production may be made.

DECLARATION, SUFFICIENCY OF.—In declaring upon an easement, the plaintiff may either allege a certain deed from one party to another, or generally that a deed supposed to have been lost had been made, without naming the parties or date. Where twenty years' user is relied upon to prove said last-mentioned deed, such declaration is sufficient. Either form is good upon demurrer.

MOLLITER MANUS IMPROSUIT in a plea is no justification of a beating and wounding.

TRESPASS for assault and battery. Defendant justified in his second plea by alleging that plaintiff, without license, and against the will of defendant, entered his close, and refusing, upon request to depart, defendant thereupon *molliter manus imposuit* to remove him, and did gently remove him. Plaintiff's second replication to this plea was demurred to, and the demurrer was sustained. His third replication set out that he was the owner of certain lands (described in the opinion), and that on the third of April, 1811, the owners of defendant's land granted to the owners of plaintiff's land a right of way over defendant's land, and that said deed is now lost. That at the time of the assault plaintiff entered upon said way within defendant's close,

as he had a right to do, to go to his lands, and that defendant of his own wrong committed the assault. Defendant demurred to this plea upon the ground that the names of the grantor and grantee of the last deed were not set out.

Bellows and Barilett, for the plaintiff.

M. W. Tappan, for the defendant.

By Court, BELL, J. No question is made that the grantee of a way is limited to use his way for the purposes and in the manner specified in his grant. He can not go out of the limits of his way, nor use it to go to any other place than that described, nor to that place for any other purpose than that specified, if the use in this respect is restricted. The grantor has the right to limit his grant in any way he chooses, and the grantee takes the way, subject to all the restrictions the grantor has imposed, and can not go beyond them without becoming a trespasser: Woolrych on Ways, 33, 50, 259, etc.; *Senhouse v. Christian*, 1 T. R. 560; *Bullard v. Harrison*, 4 Mau. & Sel. 387; *Taylor v. Whitehead*, 2 Doug. 745; *Hodder v. Holman*, 1 Rolle Abr. 391; 3 Cru. 103; *Jackson v. Stacey*, Holt N. P. 455.

The question first raised in this case is, whether the defendant has alleged in sufficient and legal form the fact that the plaintiff was using, or rather abusing, the privilege he had, in order to pass to other lands than those to which he was authorized to go by his grant. The plaintiff sets forth a grant of a right of way from the highway to a quarter-acre lot described, and that he was going across the defendant's land in this way, and not out of it, to go to that quarter-acre. The defendant admits the right of way claimed to the quarter-acre, and that the plaintiff was passing across his land in his way, and to the quarter-acre; but he alleges that the plaintiff, at the time, etc., "was passing into, over, and across the said close [of the defendant], and through said one fourth of an acre, to other lands [of the plaintiff] lying farther than and beyond the said one fourth of an acre, known," etc. The objection of the plaintiff to this plea is, that it is but an imperfect way of stating that he was intending to go to lands beyond the quarter-acre, and that such intention is not issuable.

It is generally true that in actions of trespass the intention with which a wrong is committed is not material; and it is also true, as was held in *Gates v. Lounsbury*, 20 Johns. 427, that where the law gives a license to do a particular act, an intention afterwards to abuse the license will not make the party a tres-

passer *ab initio*. But it is not true that the intent of a party is not issuable. On the contrary, wherever the intent is material, it is traversable like every other fact, and there are a great many cases where the character of an act depends entirely upon the motive. Whatever is material to the right asserted, and necessary to be proved, must be alleged in the plea by which the party would avail himself of that right; and whatever is necessary to constitute an act a wrong, and is therefore necessary to be proved, must also be alleged in pleading; not always, indeed, in direct terms, but in some substantial manner: 1 Chit. Pl. 377; 2 Id. 242, note 8; 1 Saund. Pl. & Ev. 343; *Craft v. Boite*, 1 Saund. 242, note 2; Arch. Civ. Pl. 205; *Griffith v. Harrison*, 1 Salk. 196; 8 Met. 377 [miscited]; *Jones v. Howland*, 8 Ph. Ev. 333; 1 Stark. N. P. 542, etc.

In this case the intent is, by the nature of the controversy, material. The plaintiff alleges his way, and then asserts that he was passing along his way to his quarter-acre lot. The intent and purpose to go to his lot is the very essence of his justification, and a plea would be defective without it. So the defendant alleges in his rejoinder that the plaintiff was passing over this way to lands he had beyond the three acres; that is, he was passing along the way with the intent and purpose of going to other lands to which he had no right to pass by this way. This makes the intent, as the plaintiff suggests, material. It is necessary to be alleged, and if disputed, to be proved. It is an issuable fact, because it is material. But though it would be true, if the intent were directly alleged, that it might be traversed and tried, yet that is not this case. The fact here alleged is not the intent merely, and it does not necessarily stand on the same ground that it would do if the bare intent was alleged; as if the defendant had rejoined that the plaintiff, at the time when, etc., and when he was in said way to said quarter-acre lot, did intend to go through and beyond said quarter-acre lot to other lands, etc. Upon such pleading the question might arise, as it did in *Gates v. Lounsbury*, whether a purpose and intention existing in the mind, not acted upon, mutable in its nature, and which might never be carried into effect, could render an act, lawful in itself, unlawful. And it seems probable that in such a case the court would feel compelled to follow the case of *Gates v. Lounsbury*. The rejoinder here does not allege a mere unexecuted purpose and design. It alleges that the party was passing to the land beyond; that is, that the plaintiff was then carrying his intention into effect; he

was then using the way for an unauthorized purpose. Here is a charge, not of an intention, but of an act done with wrongful intent. If the evidence shows that the party was at the time acting in pursuance of such illegal purpose, the act is illegal; and no subsequent change of intention, or failure to pursue the wrongful purpose, could make any difference. If, as is suggested by the plaintiff, the passing through the quarter-acre lot is not necessarily a wrong, it does not follow that the rejoinder is defective. It is *prima facie* a wrong, and the plaintiff must reply the facts which deprive it of its wrongful character, or he must deny the passing with the wrongful object charged in the rejoinder; and the question, What was the intent of the party in the use he was then making of this way? would then be a question for the jury.

There is no question that at the present day an uninterrupted user of an easement upon the land of another for a period of twenty years, under a claim of right, while all parties concerned are free from any disability, and seised of estates in fee in possession, is *prima facie* evidence of a right to such easement, and of a grant which is now lost, or which does not now exist: *Woolrych on Ways*, 19, 288; *Campbell v. Wilson*, 3 East, 294; *Livett v. Wilson*, 3 Bing. 115; S. C., 10 Moore, 439; *Keymer v. Summers*, Bull. N. P. 75; *Gilman v. Tilton*, 5 N. H. 233; 3 Kent's Com. 442; *Watkins v. Peck*, 13 N. H. 360.

The right to such easement may come in question in various ways, either upon pleadings, in which the party is bound to set forth his right, as he claims and expects to establish it, or incidentally upon general pleadings. At common law it was necessary for the party who alleged a grant of an interest in land to set forth the names of the parties and the date of the grant, and to proffer to produce the same to the court, that the other side might have the opportunity to hear it, and to object to it, if he chose. The loss or destruction of the deed upon which a title of this kind depended of course necessarily occasioned the loss of the title itself: *Wymark's Case*, 5 Co. 74; *Leyfield's Case*, 10 Id. 88. *Ex ideo si le fait soyt perd tout est perd*: Bro. Abr. Monstrans de faits, 137.

But with the changes of the times, the increased number of written instruments, and the consequent increased frequency of the loss or destruction of such writings, the courts have gradually yielded to a change of rule in this respect, and instead of requiring the production of the deed itself, secondary evidence was allowed of its existence and contents, upon proof of its loss

or destruction, or that it was in the possession of the adverse party; and as a necessary consequence of this change they no longer require an offer to produce the deed. They permit the party to allege an excuse for its non-production, as that it is in the hands of the defendant, or that it is by law in some custody from which it can not be removed, or that it is destroyed or lost. The loss of the direct and usual evidence of a right has not now, of course, the effect practically to destroy the right by destroying the only admissible evidence of its existence: *Pomfret v. Ricroft*, 1 Saund. 323, note 6; *Wright v. Rattray*, 1 East, 381; *Read v. Brookman*, 3 T. R. 151; *Totty v. Nesbett*, Id. 153, note; 1 Tidd Pr. 636; *Fisher v. Ford*, 12 Ad. & El. 654.

Courts occasionally evince an undue tenacity for the old maxims and rules of the common law, when the reason of them has ceased; and sometimes when new principles have been adopted by them, or have grown up with time, which are practically inconsistent with them. The ancient rule, when the party pleading a deed was bound to make a profert of it to the court, was that he must set forth the parties and the date of it. And when the rule requiring a profert has been relaxed, the same rule has of course generally continued, as the result of the doctrine of the law relative to variance, which is an essential feature of the law of pleading, and which requires that a party should state his case as he expects to prove it. While the ordinary rules as to secondary evidence were alone recognized, the party conformed his plea to his proof; that is, to his copy, or the recital of it in some other deed, or the like, or the recollection of his witness, who had seen it; and he set forth the names of the parties and the date, because if the plea was materially variant from the proof, the issue must be found against him.

The case relied on by the defendant seems to us one of the cases where courts are found sticking to the form when the substance has departed. The rule is settled beyond controversy, that long-continued user is evidence of a lost or non-existing grant, from some person who might at some time have made a valid grant to some person capable of accepting it. It proves this. It can not prove more. User of a way can not prove a grant by A. to B. on a given day, unless there be other circumstances which confine the evidence to a particular time and to the parties then interested: *Campbell v. Wilson*, 3 East, 294. The evidence of such limitation forms no essential or natural

part of the proof of user. If a grant is pleaded from a particular person to another, at a certain date, the party, upon proof of mere user, fails to prove his case as he has stated it, and must lose the verdict. Now the rule in question and this result are entirely inconsistent and incompatible, and one or the other must give way. And we think there can be no reasonable doubt which of these is to be suffered to fall into that oblivion which befits mere technicalities.

The universal rule of the law of pleading is, that a party is bound to state and give notice to the other party of all the material facts which it is necessary for him to prove in case they are denied, in order to establish the right or claim on which he relies. Whatever it is not necessary for him to prove, it is not necessary to allege; and this rule settles the question in this case. It is not necessary for the party alleging the acquisition of an easement to prove by whom or to whom or when it was granted; it is enough if he proves by twenty years' user, unexplained, a grant supposed to be lost, and of which nothing is known beyond what may be inferred from such user. It is then, of course, not necessary to allege these facts, and their omission is no cause of demurrer. This form of pleading will be defective, except in cases where the evidence consists of user alone. If the names and date are known, they must be stated, or the proof will be variant from the pleadings. On demurrer, either mode of statement is sufficient.

It is objected to the plea that it is bad on demurrer, because an allegation that a party gently laid his hands upon another, *molliter manus imposuit*, is no justification of a beating and wounding. Various authorities are cited in support of that position, to which others might be added. And whatever doubts we might have had if the question were new, the law must be regarded as settled, and the plea bad.

WHERE ROAD IS USED BY PUBLIC for twenty years or more, without obstruction or hinderance, a grant from the owners of the land over which the road runs may be presumed: *State v. Hunter*, 44 Am. Dec. 41, and note. See also *Williams v. Nelson*, 34 Id. 51, and note; *Arnold v. Stevens*, 35 Id. 311, and note. That the grant of an easement may be presumed from twenty years' user, see *Hill v. Crosby*, 13 Id. 448; *Turnbull v. Rivers*, 15 Id. 622; *Gayette v. Bethune*, 7 Id. 188; *Melvin v. Whiting*, 20 Id. 524; *Mahan v. Brown*, 28 Id. 461; *Stuyvesant v. Woodruff*, 47 Id. 156, and note, where numerous cases in this series upon the subject right of way by prescription are collected.

SECONDARY EVIDENCE OF WRITING, WHEN ADMITTED: See *Judson v. Edara*, 12 Am. Dec. 32, and note; *Bank of United States v. Sill*, 13 Id. 44.

and note; *Jackson v. Cullum*, 18 Id. 158; *Hughes v. Easten*, 20 Id. 230; *Ocean Ins. Co. v. Francis*, 19 Id. 549; *Wilmot v. Talbot*, 1 Id. 374; *Reeves v. Booth*, 12 Id. 679; *Blade v. Noland*, 27 Id. 126; *Pruden v. Alden*, 34 Id. 51; *Oriental Bank v. Haskins*, 37 Id. 140.

NOTHING PASSES AS INCIDENT TO GRANT OF RIGHT OR WAY over the land of another, except what is necessary for its reasonable and proper enjoyment: *Maxwell v. McAtee*, 48 Am. Dec. 409.

THE PRINCIPAL CASE IS CITED to the point in *Wallace v. Fletcher*, 30 N. H. 452, that long-continued user is evidence of a lost grant or deed, and that evidence of such user is sufficient without proving a deed from A. to B., or from any particular person to another; and in *Willey v. Portsmouth*, 35 Id. 311, to the point that twenty-five years' possession of a right is presumptive evidence of a grant or deed.

BURBANK, ADM'R, v. ROCKINGHAM MUTUAL FIRE INSURANCE COMPANY.

[24 NEW HAMPSHIRE, 550.]

PROVISIONS OF CHARTER OF INSURANCE COMPANY constitute part of the policy.

POLICY OF INSURANCE CONDITIONED TO BECOME VOID UPON ALIENATION by the assured is not so avoided by his death, and the consequent charge and control of his property by his administrator, or by descent to his heirs.

ALIENATION OF INSURED PROPERTY IN VIOLATION OF PROVISIONS OF POLICY avoids it. Should not a subsequent collection of assessments by the insurer, with knowledge, constitute an election to continue the policy in force? *quære*.

AGREEMENT BY INSURER, MADE DURING TERM TIME, entitled in the cause that certain property belonged to the insured becomes part of the record, is a solemn admission of the fact, and estops said insurer from denying said fact.

AGREEMENT BETWEEN DIFFERENT OWNERS OF PROPERTY that one of them shall take out insurance upon said property in his own name does not amount to double insurance.

ASSUMPSIT. Defendants issued a policy of insurance for six hundred dollars upon the property of Samuel Burbank, February 10, 1845, for the term of six years. Samuel Burbank died September 24, 1845, and plaintiff was appointed his administrator. The property was destroyed by fire February 13, 1847. Samuel Burbank, in his application for insurance, represented the property as unincumbered. The policy, to which was attached the charter and by-laws of the company, provided that upon the sale or alienation of the insured property the policy should become void, and that the same result should follow re-

insurance or double insurance of the property; and it further provided that the insured should state his title and interest in the property. In the September term, 1849, defendants, by an agreement in writing entitled in this cause, admitted that the property insured was owned by Samuel Burbank at the time of the execution of the policy. In January, 1844, Burbank, deceased, gave his bond to Jabez Hobson, Sewall Hobson, and Samuel S. Bangs, to convey to them one half of the insured premises for the sum of eight hundred and sixty-five dollars and forty-five cents. The above obligees, on the same day, made an agreement with deceased to maintain the mill and property purchased, and to rebuild in case of loss or destruction; and verbally agreed that Burbank should procure an insurance upon the property in his name for their benefit. In January, 1845, they executed a written agreement, by which Burbank was to insure their share of said property for three hundred dollars, and to apply the proceeds of said insurance, in case of loss, to the payment of their indebtedness to him. In August, 1846, plaintiff paid to defendants nine dollars and sixty cents for assessment on the premium note of Samuel Burbank, and the treasurer of defendant gave him a receipt therefor as administrator. Part of said assessment was for losses occurring after the death of Samuel Burbank. Defendant contends that the agreements with the Hobsons and Bangs was another insurance, and that the death of Samuel Burbank, and the descent of his title to his heirs, was an alienation within the meaning of their charter prohibiting an alienation, and that consequently the policy was void. The court below overruled those objections, and the jury returned a verdict for six hundred dollars for plaintiff. The questions arising upon a motion to set aside the verdict and for a new trial were transferred to this court for determination.

Marston and Emery, for the plaintiffs.

Wells and Christie, for the defendant.

By Court, EASTMAN, J. The contract of insurance which was entered into by the defendants in this case was made subject to the provisions and conditions of the charter and by-laws of the corporation. The twelfth section of the charter provides "that when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors of said company to be canceled." The provisions of this section, as well as those of the others,

are a part of the policy issued: *Roberts v. Chenango Ins. Co.*, 3 Hill (N. Y.), 501; *Houghton v. Man. Mut. Fire Ins. Co.*, 8 Met. 114 [41 Am. Dec. 489]; *Jennings v. Chenango Co. Mut. Fire Ins. Co.*, 2 Denio, 75. And the first question which we propose to consider is, Had the property insured become alienated, within the meaning of the charter, by the death of Samuel Burbank, the assured?

To alienate is to transfer the property in anything to another; and an alienation is to make a thing another man's, to alter the possession from one to another. Such are the definitions given in the old books.

As understood at common law, to alienate real estate is voluntarily to part with the ownership to it, either by bargain and sale, or by some conveyance, or by gift or will. The right to alienate was a right which the owner had over the real estate, to divert it from the heir. Alienation differs from descent in this, that alienation is effected by the voluntary act of the owner of the property, while descent is the legal consequence of the decease of the owner, and is not changed by any previous act of volition of the owner. A sale and conveyance is an alienation that takes effect from the time of the transfer, while a devise is an alienation that takes effect on the decease of the testator, according to the terms of the will. But property not transferred or devised is not alienated, according to the principles of the common law.

There is, however, a species of involuntary alienation, so made by the statutes of 13 Edw. I. and 27 Edw. III., by which the land becomes answerable by attachment and extent for the debts of the owner. The doctrine and principles of alienation will be found discussed in 4 Kent's Com. 441, and 2 Bla. Com. 287.

Unless, then, there shall be something in the signification of the term "alienate," as used in the twelfth section of the charter, differing from the common-law meaning of the word, the property did not become alienated by the death of the assured, and consequently the policy would not be made void thereby.

We have, therefore, examined the policy, charter, and by-laws, with some attention, to see if we could discover any good reason or principle for extending the construction of the term "alienate" beyond its common-law signification, and we have been unable to find either. The contract of insurance ought not to be terminated by the company, except by the express terms of the policy or the prohibited act of the insured. If the assured conveys the property, there is good reason why the insurance

should cease. So in case it shall be devised; for the grantee or devisee can at once procure it to be insured. The company, too, have not contracted with either, and they might not be disposed to insure either. But where the property passes into the hands of an administrator, and is held by him for the creditors or heirs, who may be numerous and scattered, the same reason does not exist. It would in many instances be difficult if not impossible for them personally to effect an insurance, and it could only be done by the administrator for their benefit; and in such instances, the property would necessarily be uninsured during the time intervening between the death of the assured and the appointment of the administrator. It is also a pertinent inquiry, whether the provision in the policy insuring the assured, and his heirs, executors, administrators, and assigns, would not be entirely nugatory if the death of the assured operates *ipso facto* as an alienation of the property. The provision in the charter requiring the assent of the directors in order to make an assignment or transfer valid does not render void the other provision by which the assigns are insured. It only points out the course to be taken to make the assignment effective.

In this case it is worthy of remark, that the defendants do not appear to have considered the death of Samuel Burbank as operating as an alienation of the property, till after the commencement of this suit. They made assessments and received the amount assessed against the property of James M. Burbank, the administrator, and gave him a receipt therefor. They voted to pay the administrator four hundred dollars in full for the loss of property; and in their subsequent vote, rescinding the former one to pay, they did not place the rescission upon the ground that the property had become alienated, but upon the ground that they had received information that the assured had not a title in fee simple, unincumbered, to the mill insured, but that he had a less estate in the same.

Were it necessary, also, for a decision of the case, an inquiry might likewise be instituted into the assessments made prior to the loss of the property, and subsequent to the death of Samuel Burbank, and collected of the administrator. Where the property has not been destroyed, but passes in some way into the hands of another, the policy is either void or not from the day that the property changes hands. If void, ought it not to be alike so for both parties? The assured should be liable for his proportion of all losses and expenses up to that time; but as the company have paid nothing, so as to create a liability

upon him during the whole term of the insurance, there would seem to be no principle that should make him holden to pay for subsequent losses if the company is not also liable to him, or to the person holding the policy, for the destruction of the property insured. If the property is actually alienated, nothing can be recovered on the policy for anything that occurs subsequent to that time; and ought the company to have any claim upon the assured for losses after that date? If they ought not, then if they make and collect assessments for losses that subsequently occur, with a knowledge that the property has been transferred, should it not be held that they elect to continue in force the policy?

But without pursuing the question of alienation any further, we have no hesitancy in holding that the property did not become alienated by the death of Samuel Burbank, and that the descent of the title to the heirs, if there were any, was not an alienation according to the principles of the common law, nor within the meaning of the charter.

The representation of the title and interest in the property, as required by the eighteenth article of the by-laws, was not strictly correct. The article requires that the "applicant for insurance shall make a true representation of the situation of the property on which he requests insurance, so far as concerns the risk and value thereof, and of his title and interest therein." The insurance was made February 10, 1845, and was to Burbank alone. The application stated the property to be Burbank's, and that it was unincumbered. In the strict technical sense of the phrase, it was his, and it was unincumbered; while at the same time the Hobsons and Bangs had a bond of one undivided half of it. Their interest was such as could have been taken by an extent: *Edgerly v. Sanborn*, 6 N. H. 397; *Pritchard v. Brown*, 4 Id. 397 [17 Am. Dec. 431]. It was an equitable interest, and such as could have been insured: *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *McGirney v. Phoenix Fire Ins. Co.*, 1 Wend. 85. And Burbank should have stated the situation of the property, just as it was. Had he done this, the company would probably have made the insurance quite as readily, and no defense of misrepresentation could have then been made.

But whatever would be held to be the effect of the representation that was made—whether it would have rendered void the policy or not—the objection, whatever its force, was cured by the agreement entered into September term, 1849. The defend-

acts, by that agreement, admitted that the property insured by the policy was owned by Samuel Burbank at the time of the execution of the policy, as set forth in his application. This agreement, being made in term time, becomes part of the record, and is, as the books term it, a solemn admission of the fact: *Doe v. Bird*, 7 Car. & P. 6; *Langley v. Lord Oxford*, 1 Mee. & W. 508; 1 Greenl. Ev., secs. 27, 186. It is an admission that there was, in truth, a correct representation in the application, of the title and interest of the assured in the property.

Burbank could have effected an insurance upon the whole property, according to the agreement of the Hobsons and Bangs, if the company would take the risk; and as he probably acted in good faith in making the application, supposing that he had a right so to do, it was by no means discreditable in the company to make the admission which they did.

Nor can the position that there was here a double insurance be successfully maintained. The fifteenth section of the charter provides "that if insurance on any house or building shall be and subsist in said company, and in any other office, or from or by any other person or persons at the same time, the insurance made in and by this company shall become void, unless such double insurance subsist with the assent of the directors, signified by indorsement on the back of the policy, signed by the president and secretary."

There is no pretense that this property was insured in any other company, nor was there any other person than Burbank insured by this company, unless it were the Hobsons and Bangs. Only one policy was issued, and that was to Burbank. The amount taken upon the whole property was only six hundred dollars, while the consideration agreed to be paid by the Hobsons and Bangs for the one undivided half was eight hundred and sixty-five dollars and forty-five cents. There was then no excess of insurance; no application by the Hobsons and Bangs for an insurance; no policy issued to them; and nothing that could be construed into a double insurance, unless it were the agreement of the Hobsons and Bangs, made on the thirty-first of January, 1845, that Burbank might procure an insurance of three hundred dollars upon what they termed their half of the mill, at their expense, as security in fact to Burbank for the amount for which they were at that time indebted to him. Now, we think there can be no doubt that this was not such a double insurance as the charter contemplates. It was a mere agreement between those who were interested in the property, entered into

without any appearance of fraud, and to the injury of no one. The Hobsons and Bangs can have no claim upon the company, for the company made no contract with them. If they have a claim upon any one, it can only be upon the plaintiff, by virtue of the agreement made between them and Samuel Burbank.

It is hardly necessary to allude to the verbal agreement made between Burbank and the Hobsons and Bangs, in 1844, about the time the bonds were given, since that agreement must have been superseded by the written one that was executed in January, 1845, a short time before the insurance was effected.

It is stated in the argument that this suit can not be maintained by the administrator. But no question of that kind is raised in the case, and none is properly before us. The property destroyed was situated in the state of Maine; and what the statutes of that state are, as applicable to cases of this kind, does not appear. If before us, they might show that the administrator had the control of the rights accruing under the policy, and that he was the proper person to institute the suit.

Had the property destroyed been situated in this state, so that the question would have to be determined by our laws, we might perhaps inquire whether the administrator had not such an interest in the policy, as trustee for the creditors or heirs, or both, and also to recover compensation for his own services, as would enable him to bring the suit.

But it is not necessary to determine the question suggested in the argument, as it is not raised by the case. Neither is it necessary in the view which the court have taken of the plaintiff's right of recovery, to consider at all the effect of the vote of the directors to pay four hundred dollars in full for the loss. Our opinion is, that the plaintiff's right of action is complete without any reliance upon that vote; that the defense set up can not be sustained, and that there must be judgment on the verdict.

SUBJECT OF ALIENATION AS DEPRIVING INSURANCE is discussed at length in note to *Lane v. M. M. F. Ins. Co.*, 28 Am. Dec. 150. In this note, page 150, several cases are cited to sustain the proposition that the death of the insured is not such an alienation as will avoid a policy.

PROPOSALS AND CONDITIONS ATTACHED TO POLICY form part of the contract, the same as if written in the body of it: *Duncan v. Sun Fire Ins. Co.*, 22 Am. Dec. 539, and note.

TO CONSTITUTE DOUBLE INSURANCE, both policies must be upon the same insurable interest, either in the name of the owner thereof or for his benefit: *Etna Fire Ins. Co. v. Tyler*, 30 Id. 90. See also note to *Alliance M. A. Co. v. Louisiana State Ins. Co.*, 28 Id. 117.

TIBBETS v. GERRISH.

[26 NEW HAMPSHIRE, 41.]

COUNT FOR MONEY HAD AND RECEIVED CAN NOT BE SUSTAINED by note payable in specific articles; but it may be declared upon specially, as upon a negotiable cash note.

BLANK INDORSEMENT, ACCCOMPANIED BY DELIVERY, IS SUFFICIENT AS ASSIGNMENT of a non-negotiable note.

PERSONS THROUGH WHOSE HANDS NON-NEGOTIABLE NOTE HAS PASSED need not be noticed by assignee in declaring on it, unless their names appear upon it as indorsers or assignors.

CONSIDERATION BETWEEN ASSIGNOR AND ASSIGNEE NEED NOT BE PROVED in an action by the assignee against the maker of a non-negotiable note, and a formal statement of it in the declaration is sufficient.

NOTE PAYABLE IN SPECIFIC ARTICLES IS NOT NEGOTIABLE.

ASSIGNEE OF NON-NEGOTIABLE NOTE MAY MAINTAIN SUIT THEREON IN ASSIGNOR'S NAME.

EXPRESS PROMISE BY MAKER TO PAY ASSIGNEE OF NON-NEGOTIABLE NOTE enables assignee to maintain action in his own name against the maker.

EVIDENCE THAT MAKER OF NON-NEGOTIABLE NOTE PROMISED to pay it to the assignee if he signed it is competent evidence to show an express promise to pay to the assignee, the maker's signature having been proved or admitted.

ACTION AGAINST ADULT ON CONTRACT MADE BY HIM WHEN INFANT can not be sustained, unless after majority there be an express ratification, either by a new promise to pay or by such positive acts as amount to an express and unequivocal promise. The rule is more stringent than where the defense is the statute of limitations.

PROMISE BY ADULT TO PAY NOTE MADE IN INFANCY, if he signed it, is competent evidence, the signature having been admitted, to remove the bar of infancy.

Assumpsit on a promissory note. There were two counts. The first alleged that the defendant, for a valuable consideration, executed his promissory note to William T. Wentworth, and thereby promised to pay to him, or his order, the sum of forty dollars on demand, to be paid in hard wood at the market price at the time of payment; that the payee afterwards indorsed and delivered the note to the plaintiff, of which the defendant had notice, and the defendant promised the plaintiff to pay him the note according to its tenor; and that the defendant, though requested, had not delivered the wood. The second count was for money had and received. The defendant pleaded the general issue, and pleaded specially his infancy at the time of the making of the note. To the second plea the plaintiff replied that the defendant had, after attaining his majority, promised the plaintiff to pay the note. Upon a rejoinder tendering an

issue to the country, issue was joined. At the trial it appeared that Wentworth, the payee, had indorsed the note in blank, and delivered it to the firm of Tibbets & Brooks, of which the plaintiff was a member. The firm paid a valuable consideration for it. The firm was dissolved, and upon a division of the funds, the note became the plaintiff's sole property. After this, and after the defendant came of age, the plaintiff delivered the note to an attorney for collection. The attorney testified that the defendant came to his office, at first denied all knowledge of the note, and afterwards said, "If I did sign it, I am good for it." The attorney then said, "If you did sign the note, will you pay it to Mr. Tibbets?" and the defendant replied, "I will." The attorney then sent for Tibbets and repeated the above conversation in the presence of Tibbets and the defendant. On cross-examination it appeared that after the relation of the conversation to Tibbets, Tibbets requested the defendant to pay the note, and the defendant replied that he would not pay it, but assigned no reason for his refusal; but, as it seemed to the witness, refused on the ground that he had not signed it. It was admitted that the defendant signed the note. By consent, verdict was for the plaintiff. The defendant moved to set aside the verdict, and for a new trial, on the grounds—1. That plaintiff's evidence was incompetent to sustain his declaration; 2. That there was a variance between the proof and the declaration; 3. That the evidence failed to make out the issue in favor of the plaintiff on the plea of infancy. A motion in arrest of judgment was made on the ground that no cause of action was stated in the declaration. These questions were assigned for determination to this court.

McCrillis and J. S. Wells, for the plaintiff.

Wells and Bell, for the defendant.

By Court, EASTMAN, J. It is settled in this state, that a count for money had and received can not be sustained by a note or contract like the one in suit. Even were the action brought by Wentworth, the payee, and were there no defense of infancy, a recovery could not be had upon a general declaration for money had and received. Such is the direct doctrine of *Wilson v. George*, 10 N. H. 445.

It seems, however, to be equally well settled here, although a different doctrine prevails elsewhere, that an action can be maintained upon a contract of this kind in the name of the payee, by

declaring specially as upon a negotiable note: *Odiorne v. Odiorne*, 5 N. H. 315; *Wilson v. George*, 10 Id. 447.

In *Odiorne v. Odiorne*, the court say: "In Massachusetts, the custom has always been to declare upon notes payable out of a particular fund—in specific articles, or upon a contingency—in the same manner as upon cash notes strictly negotiable. In this state the custom is believed to have been the same as in Massachusetts."

But this action was not brought by the payee, but by Tibbets, the assignee. The assignment is in sufficient form, being in blank, when delivery accompanies it; and the fact that it was transferred in blank to Tibbets and Brooks does not vary the rights, under the declaration, as contended in the argument; for in declaring upon a transferred instrument it is not necessary to notice the several hands through which it has passed, unless their names appear upon the instrument as indorsers or assignors. It seems also that it is not necessary that any consideration between the assignor and the assignee be proved, and a formal statement of it, as in this declaration, is sufficient: *Norris v. Hall*, 18 Me. 332.

The instrument declared on in this case is not negotiable; still it is a contract capable of being assigned, and an equitable interest becomes vested in the assignee, sufficient to enable him to maintain a suit in the name of the assignor. An action can also be sustained in the name of the assignee if it appear that there has been an express promise to pay the assignee: *Currier v. Hodgdon*, 3 N. H. 82; *Wiggin v. Damrell*, 4 Id. 73; *Morse v. Bellows*, 7 Id. 549 [28 Am. Dec. 372]; *Smith v. Berry*, 18 Me. 122; *Hodges v. Eastman*, 12 Vt. 358; *Coolidge v. Ruggles*, 15 Mass. 388; *Crocker v. Whitney*, 10 Id. 316; *Norris v. Hall*, 18 Me. 332.

There was evidence here competent to show an express promise to pay the amount to Tibbets. The witness, among other things, said to the defendant, "If you did sign the note, will you pay it to Mr. Tibbets?" And the defendant said, "I will." And on the trial it was conceded that the note was signed by the defendant.

In addition to the grounds taken by the defense, which we have already noticed, there is one other, that of infancy; and the replication to the plea of infancy is a new promise.

Where the defense interposed is that of infancy, and a new promise is relied upon, a more stringent rule prevails than where the defense is the statute of limitations. To sustain an

action against a person of full age, on a promise made by him when an infant, there must be an express ratification, either by a new promise to pay, or by positive acts of the individual, after he has been of age a reasonable time, in favor of his contract, which are of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise: *Hale v. Gerrish*, 8 N. H. 374; *Merriam v. Wilkins*, 6 Id. 432 [25 Am. Dec. 472]; *Thompson v. Lay*, 4 Pick. 48 [16 Am. Dec. 325]; *Goodsell v. Myers*, 3 Wend. 479.

We think the evidence in this action was competent to bring the case within the rule above laid down. The promise was direct to pay, if the note was signed; and from the evidence produced a jury might well enough find an absolute promise. This defense, then, also fails, and there must be judgment on the verdict.

ADMISSIBILITY OF NOTE, BILL, ETC., UNDER COUNT FOR MONEY HAD AND RECEIVED: See note to *Wells v. Brigham*, 52 Am. Dec. 758; *Tebbetts v. Pickering*, 51 Id. 48, and cases cited in the note. In *Payne v. Couch*, 46 Id. 497, it is held that a note payable in specific articles is admissible under the money counts.

NOTES PAYABLE IN SPECIFIC ARTICLES: See note on this subject: *Roberts v. Beatty*, 21 Am. Dec. 422; *Dunman v. Strother*, 46 Id. 97, and cases cited in the note.

BLANK INDORSEMENT OF NON-NEGOTIABLE PAPER, EFFECT OF.—In *Taylor v. Larkin*, 49 Am. Dec. 119, it is held that such an indorsement is a mere authority to the holder to fill it up, but until this is done the legal title is in the payee: See *Prentiss v. Danielson*, 13 Id. 52, and extensive note 55.

ASSIGNEE OF NON-NEGOTIABLE CHOSE IN ACTION does not acquire legal title thereto: *Beecher v. Buckingham*, 44 Am. Dec. 580; *Blanchard v. Ely*, 34 Id. 250.

ASSIGNEE OF CHOSE IN ACTION MAY SUE IN HIS OWN NAME on an express promise of debtor to pay him: See *Muir v. Schenck*, 38 Am. Dec. 633.

NEGOTIABLE PROMISSORY NOTE, REQUISITES OF: See *Fralick v. Norton*, 55 Am. Dec. 56, and cases cited in the note.

PROMISE BY PERSON AFTER MAJORITY TO PAY CONTRACT MADE IN INFANCY removes the bar: *Hoit v. Underhill*, 34 Am. Dec. 148; and see the cases cited in the note. See also S. C., 32 Id. 380, and *Edgerly v. Shaw, post*, p. 349.

WOODMAN v. HUBBARD.

[25 NEW HAMPSHIRE, 67.]

CONTRACT MADE ON SUNDAY IS VOID, when a statute forbids it to be made on that day, though it be otherwise lawful.

OWNER PLACING HIS PROPERTY IN HANDS OF ANOTHER to be used temporarily for an unlawful purpose does not forfeit his property in the thing thus delivered.

BAILOR MAY HAVE ACTION FOR CONVERSION OR INJURY OF PROPERTY

BAILED, though the contract of bailment was void, being made on Sunday; for in such an action he claims as general owner, and not under the contract.

CONVERSION CONSISTS IN ILLEGAL CONTROL OF THING CONVERTED, inconsistent with owner's right of property.

IT IS CONVERSION IF ONE HIRE HORSE TO BE DRIVEN TO ONE PLACE AND VOLUNTARILY DRIVE HIM TO ANOTHER, and trover will lie.

PLAINTIFF CAN NOT RECOVER IN TROVER, ALTHOUGH THERE HAS BEEN TECHNICAL CONVERSION, if his real and substantial claim is merely to recover damages for the breach of an illegal contract.

DRIVING HORSE BEYOND PLACE FOR WHICH HE WAS HIRED IS SUBSTANTIAL CONVERSION AND DIRECT INJURY TO OWNER'S RIGHT OF PROPERTY, and not in substance a mere breach of the hirer's contract.

CASE by Woodman against Hubbard for causing the death of a horse let by the plaintiff to the defendant, by unreasonable and immoderate overloading and driving. In a second count the plaintiff declared in trover for a conversion of the horse. On a Sunday, the defendant, for a stipulated price, hired the horse to go from Great Falls village to South Berwick village. He drove to South Berwick and thence to another town some miles farther, and upon the same day redelivered the horse to the plaintiff at Great Falls village. The horse soon afterwards sickened, and on the next day died; and evidence was introduced tending to show that the death of the horse resulted from the defendant's unreasonable and immoderate driving. The defendant contended that the contract of hiring, being made on Sunday, and for the purpose of performing a service on that day, was illegal, and therefore that the plaintiff could not recover under either count. The jury were instructed that the defendant was not liable under the first count; but that if he drove the horse to a place beyond that for which the horse was hired, and if, under a fair understanding of the agreement, he was not authorized to drive the horse thither, the defendant converted the property when he drove beyond the place agreed upon, and would be liable under the second count. As to damages, they were instructed that a return of the property was a mitigation of damages; but any decrease in the value of the property caused by the defendant's driving after the conversion should be deducted from the sum which would otherwise have been the value of the property upon its return; and if they found that the defendant's driving after the conversion contributed to the death of the horse, and that he was of no value when returned, the measure of damages would be the full value

of the horse at the time of the conversion. Defendant excepted to these instructions, and the verdict being for the plaintiff, moved to set it aside and for a new trial.

R. Eastman, for the plaintiff.

Jordan and McCrillis, for the defendant.

By Court, PERLEY, J. It is a general and well-established rule that no action can be maintained on a contract made in violation of law. When a contract is made on Sunday, and the making of it on that day is forbidden by statute, the contract is void, though the thing contracted to be done may be lawful; as in the case of a promissory note to pay money which the maker owes to the payee. And a contract made on another day to do an act in violation of the law for the observance of the Lord's day would be void.

The provision of the revised statutes on this subject, chapter 118, section 1, is as follows: "No person shall do any work, business, or labor of his secular calling, to the disturbance of others, works of necessity and mercy excepted, on the first day of the week, commonly called the Lord's day, nor shall any person use any play, game, or recreation on that day, or any part thereof."

Whether the letting of a horse on Sunday is necessarily and in all cases a work or business to the disturbance of others, and whether every ride or drive made on Sunday for mere relaxation and exercise must be regarded as an unlawful recreation within the meaning of the statute, it is not necessary in this case to decide. The instructions of the court to the jury went upon the ground that the contract was illegal, and in this respect were sufficiently favorable to the defendant. Was the other part of the charge correct, in which the court instructed the jury that if the defendant voluntarily drove the horse to a place beyond that for which he was hired he was liable in trover?

If the owner places his property in the hands of another to be used temporarily for an unlawful purpose, or in any unlawful way, though the contract which he makes respecting the illegal use is void, he does not forfeit his property in the thing which he has thus delivered to another on an illegal contract. Where the property is intrusted to another to be wholly devoted and appropriated to an illegal purpose, perhaps the law is different; as in the case where goods are shipped to be carried to the public enemy.

In *Dwight v. Brewster*, 1 Pick. 51 [11 Am. Dec. 133], the

action was case, with a count in trover for a package of bank notes delivered to the defendant to be carried from Northampton to Springfield. The court, Parker, C. J., say: "The principal ground of defense to the action was, that by the law of the United States it was made unlawful for a carrier of the mail to take any letter or packet and deliver it to the person to whom it was sent, and that such mail-carrier was made liable to a penalty for so doing; that if it was unlawful to carry, it must be unlawful to send, and that no action could be maintained for the non-performance of an undertaking that constituted an offense. The principle settled is that a party to an unlawful contract shall not receive the aid of the law to enforce that contract, or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract, who becomes possessed of the property of the other party, with which he is to do something which the law prohibits, can acquire a right to that property. The contract being void, the property is not changed if it remains in the hands of him to whom it was committed. If he has executed the contract with it, or it has become forfeited by judicial process, or if stolen or lost without his fault, he may defend himself against any demand of the owner in ordinary cases; but if he has it in his possession he must be liable for the value of it; and in an action of trover, with proper evidence of a conversion, the plaintiff would undoubtedly prevail." *Lewis v. Littlefield*, 15 Me. 233, and *Phalen v. Clark*, 19 Conn. 421 [50 Am. Dec. 253], are to the same point.

The same general doctrine is implied in *Frost v. Hull*, 4 N. H. 153; and we have seen no authority which tends to contradict the rule that in a case like this, though the contract may be void, the property in the thing bailed for the illegal use remains with the former owner.

The property in the horse remained, therefore, in the plaintiff; and it would seem to follow as a necessary conclusion that for a direct, substantial invasion of that right, he might maintain the proper action against the defendant or a third person. In such an action he would not claim by or through the illegal contract, but would claim as the general owner of the horse, for an injury done to his right of property, which was antecedent to the contract, and not derived from it, nor defeated by it.

The action of trover is founded upon property in the plaintiff and a conversion by the defendant. A conversion consists in an illegal control of the thing converted. inconsistent with the

plaintiff's right of property. If one hire a horse to be driven to one place, and voluntarily drive him to another, it is a conversion, and trover will lie: *Wheelock v. Wheelwright*, 5 Mass. 104.

This is in accordance with the law in other cases, where the bailee for one purpose diverts the thing bailed to another; as where a carrier uses or sells, or delivers to the wrong party, the commodity which he received to transport. The circumstance that the property is in the hands of the bailee, with the license of the owner to use it for one purpose, gives no right to use it for another; and the invasion of the owner's right of property is as complete when the bailee goes beyond his license and duty as if the control over the property were usurped without any bailment. There can be no doubt, on the authorities, that trover would be a proper remedy in this case, if the illegality of the contract on which the defendant took the horse into his possession had not been set up as a defense.

If, however, though there has been in this case a technical, legal conversion, the real and substantial claim of the plaintiff is merely to recover damages for the breach of an illegal contract; if he must, notwithstanding the form of his action, claim in fact by and through his contract, he can not evade the consequences of his illegal act by adopting a fictitious action, allowed in ordinary cases for the purposes of the remedy. In some cases the plaintiff, for convenience of his remedy, when his claim arises under a contract, is allowed to allege his *gravamen* in a criminal neglect of duty in the manner of performing, or in neglecting to perform the contract: *Govett v. Radnidge*, 3 East, 62. But in such case, by varying the form of the remedy, the plaintiff can not deprive his adversary of any defense, such as infancy, which he might have set up if the claim had been made for a breach of the contract: *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marsh. 485; S. C., 4 Eng. Com. L. 496; *Fitts v. Hall*, 9 N. H. 441.

The question, then, becomes material whether the only real injury which the plaintiff suffered was by a breach of the contract; or whether the driving of the horse to another place was a substantial invasion of the plaintiff's right of property.

When the defendant voluntarily drove the horse beyond the limits for which he was hired, he acted wholly without right. He then took the horse into his own control, without any authority or license from the owner. The conversion was as law as complete, the wrongful invasion of the plaintiff's right of property was as absolute, as if instead of driving the horse a

few miles beyond the place for which he had hired him, he had detained and used him for a year, or any other indefinite time, or had driven him to market and sold him. If taking the wrongful control of the horse, and driving him ten miles, was not a substantial conversion, how far must the defendant have driven him? How long must he have detained him? And what other and further wrongful acts was it necessary that he should do in order to make himself a substantial and real wrong-doer? It would seem to be quite clear that if the original act, assuming control over the horse, was not a substantial invasion of the plaintiff's right of property, no subsequent use or abuse of the horse by the defendant could make it so; and that if the defendant can not on the facts of this case be charged for the conversion of the horse, he could not have been if he had sold or willfully destroyed him. In other words, the plaintiff having delivered the horse into the defendant's hands on a contract that was illegal, but which nevertheless left the general property in the plaintiff, the defendant may do what he will with the horse, and the plaintiff can have no remedy, because whatever he does can be no more than a breach of his unlawful contract to return the horse. This does not appear to be a reasonable conclusion. The cases are not entirely unanimous as to what acts of a bailee, who receives goods on a void or voidable contract, are sufficient to make him liable for a tortious conversion. The question has arisen most frequently where infancy has been set up as a defense. *Vasse v. Smith*, 6 Cranch, 231; *Campbell v. Stakes*, 2 Wend. 137 [19 Am. Dec. 561]; *Mills v. Graham*, 1 Bos. & Pul. N. R. 140; *Homer v. Thwing*, 3 Pick. 492, are strong authorities to the point that an infant who receives goods on a contract, and disposes of the property without right, is liable in trover; and these cases are cited and approved by the learned chief justice, in *Fitts v. Hall*, 9 N. H. 443. *Will v. Welsh*, 6 Watts, 9, and perhaps *Jennings v. Rundall*, 8 T. R. 335, must be regarded as somewhat in conflict with these cases. *Jennings v. Rundall*, however, is criticised and doubted in *Fitts v. Hall*. *Homer v. Thwing*, 3 Pick. 492, maintains the position that in a case like this, driving the horse beyond the place for which he was hired is a substantial conversion and a direct injury to the plaintiff's right of property, and not in substance a mere breach of the defendant's contract. In that case it was held that infancy was no defense to trover for such a conversion of a horse. If the action had been substantially upon the infant's voidable contract, he could not have been charged. We think the weight of

authority and of argument are very decidedly in favor of the rule declared in *Homer v. Thwing*.

From these premises the conclusion would seem to follow that trover may be maintained on the facts of this case. If the plaintiff made an illegal contract respecting the horse, that contract is void; but the illegal contract being for a temporary use of the horse, the consequences do not extend to a forfeiture of the plaintiff's general right of property; and for a wrongful invasion of that right he may maintain trover against the defendant, the bailee, or a third person. This is the doctrine of *Dwight v. Brewster*, 1 Pick. 51 [11 Am. Dec. 133]. In that case the contract was not only void, but illegal.

Driving the horse beyond the place for which he was hired is a wrongful invasion of the plaintiff's right of property, and a substantial conversion. In trover for such a conversion, the plaintiff's claim is neither in form nor in substance by, through, or under the illegal contract, and the invalidity and illegality of the contract are no defense to the suit. The contract is no link in the chain of the plaintiff's case; he shows the contract, which was invalid and illegal; but notwithstanding the contract, and in spite of it, his right of property remained. That right has been directly invaded by the defendant's wrongful act, and this action is the appropriate remedy.

In this case the defense set up is that the plaintiff's contract was not merely invalid, as in the case of infancy, but illegal; and that in showing the conversion of the horse, by driving beyond the place for which he was hired, the plaintiff was obliged to prove his own illegal act. It has been sometimes laid down in general terms that the plaintiff can not recover, if, in order to make out his case, he is obliged to show his own illegal act. This is undoubtedly the rule where the plaintiff's illegal act is in whole or in part the foundation of his claim. In the cases usually cited as authorities for this rule, the plaintiff's claim was made through or under the illegal act: *Simpson v. Bloss*, 7 Taunt. 246; S. C., 2 Eng. Com. L. 346; *Fivaz v. Nicholls*, 2 Man. G. & S. 500; S. C., 52 Eng. Com. L. 501. But where the wrong is done to the plaintiff's property, and the facts are connected with an illegal contract respecting the property, which does not affect the plaintiff's right of property, these cases do not show that he can not recover, because he is incidentally obliged to prove a contract which leaves his right of property untouched, and does not in its consequences reach to the case on which he relies. The illegal act of the plaintiff is in the case: *valeat*

quantum, the question still remains, What is its effect on his right to recover?

Phalen v. Clark, 19 Conn. 421 [50 Am. Dec. 253], which appears to have been a very well-considered case, is strongly in point. The plaintiff in that case could not show his property in the lottery ticket, which was the subject of the suit, without showing his illegal contract with the defendant respecting the ticket; yet, as it appeared when the illegal contract was shown that it did not extend to the plaintiff's property in the ticket, the court held him entitled to recover. The true rule is, we think, stated in that case as follows: "If the plaintiff requires any aid from an illegal transaction to establish his demand, he can not recover it; or in other words, if he is unable to support it without relying upon an unlawful agreement between him and the defendant, he must fail:" *Id.* 432. Upon this point the dissenting opinion of Ellsworth, J., would not seem to weaken the authority of the case; for his dissent was put on the ground that the fraud of the defendant was committed in the execution of his illegal agency. He says: "The plaintiffs rest and must rest their claim to recover on fraud in their agent or fraud in a forbidden agency. The payment is an act in the progress and consummation of the illegal enterprise against the laws of this state." The majority of the court were of opinion that the illegal contract of the plaintiff was at an end, and that the injury was to the plaintiff's right of property in the ticket, notwithstanding the illegal contract which had been made respecting it. *Lewis v. Littlefield*, 15 Me. 233, and *Dwight v. Brewster, supra*, go to establish the same rule.

Nor is the plaintiff obliged to garble or suppress the facts of his case. When they all appear, his illegal act still leaves him his right of property in the horse, and his remedy for the conversion. It is not like the case of *Booth v. Hodgson*, 6 T. R. 405, which was a claim made to recover premiums paid for illegal insurances, in which the plaintiff and one of the defendants had been jointly concerned.

One case of high authority we are obliged to regard as in conflict with the conclusion to which we have arrived, and that is the recent case of *Gregg v. Wyman*, 4 Cush. 322, in the supreme court, of Massachusetts. The able and elaborate judgment in that case, and the great respect due to all the decisions of that court have caused the principal hesitation which we have felt in holding that the present action could be maintained. We understand the decision in *Gregg v. Wyman* to be put, in the

first place, upon the ground that the claim of the plaintiff, though in form for a tort, was in substance to recover damages for the breach of the illegal contract. This position does not appear to be very confidently maintained, and would seem to be entirely inconsistent with the case of *Homer v. Thwing*, 3 Pick. 492, decided in the same court. If the cases are to be regarded as in conflict, we prefer the rule of *Homer v. Thwing*.

The other ground is, that the plaintiff could not prove his case, without showing the illegal contract by which the horse went into the defendant's hands; that he could not show the conversion of the horse by driving beyond the place for which he was hired, without showing the terms of the illegal contract; and therefore, as he was obliged to show his own illegal act on making out his case, he can not recover.

Granting that in order to show the wrongful act of the defendant, upon which he relied, the plaintiff was obliged to prove that he had made an illegal and void contract and violated the law, the question still recurs and remains, whether the consequences of his illegal act affect his right of property in the horse, and whether the defendant's act was a direct injury to that right, or only in substance a breach of the illegal contract. The general property remained in the plaintiff. That does not seem to be anywhere denied, and is the express doctrine of *Dwight v. Brewster*, and is necessarily involved in *Phalen v. Clark* and *Lewis v. Littlefield*. It would not seem to follow as a legal or a logical consequence, that because the plaintiff had made an illegal contract respecting the horse, which still left the property in him, that though the illegal contract necessarily appeared in the plaintiff's proof of a direct and substantive injury to his property, no recovery could be had. The illegal contract appears in the case; the plaintiff has violated the law, and the contract is void. What then? The plaintiff's property in the horse still remains. Was the act of the defendant within the limits and scope of the contract, and a mere breach of it? If so, he is not liable. But if the act was not covered by the contract, and done within it and under it, but was a direct, voluntary wrong to the plaintiff's right of property, he may recover. The reasoning of the court in *Gregg v. Wyman* is quite conclusive to show that the plaintiff, having absolute power over his own property, and having delivered it to the defendant, the plaintiff can never show that the defendant has done any wrong to his right of property without showing the contract on which it was delivered. So if the defendant should refuse to deliver the horse

on demand, or should sell him or destroy him, it would in none of these cases appear that any wrong had been done to the plaintiff until he showed the contract, and that the act of the defendant was not under and within it. Whether the horse was delivered on a sale to the defendant, or on an agency to sell, would not appear without evidence of the contract. It necessarily follows from this view of the case, that a man is wholly without remedy for any injury that may be done to the horse he lets on Sunday, in violation of law, if the necessity of showing his illegal contract will preclude his recovery. Though the property is conceded to remain in the plaintiff, he has no remedy to enforce his right, because he can not show it without showing the illegal contract of letting. And in all the numerous cases where horses are illegally let on Sunday, the hirer might with perfect impunity retain or sell them. This appears to us to be pushing the application of a well-settled principle to an unnecessary and extravagant length, not required nor warranted by the general current of the authorities. We are of opinion that the instructions of the court were correct, and that there must be judgment on the verdict.

We do not understand that we are by this decision infringing upon the rule that no action can be maintained on a contract made in violation of law; we mean to leave that principle wholly untouched; but are of opinion that it does not reach to this case.

VALIDITY OF CONTRACTS MADE ON SUNDAY: See *Moore v. Kendall*, 52 Am. Dec. 145, and note citing prior cases.

CONVERSION, WHAT CONSTITUTES: See *Maxwell v. Harrison*, 52 Am. Dec. 385, and cases cited in the note; *Harker v. Dement*, Id. 670, and note.

TROVER LIES WHEN RIGHT OF PROPERTY AND POSSESSION ARE UNITED in the plaintiff at the time of the conversion: *Brazier v. Ansley*, 51 Am. Dec. 408; *Danley v. Rector*, 50 Id. 242, and note citing prior cases.

CONTRACTS IN VIOLATION OF LAW ARE NOT ENFORCEABLE: *Ohio L. I. & T. Co. v. Merchants' etc. Co.*, 53 Am. Dec. 742, and note; *Spalding v. Preston*, 50 Id. 68; *Morgan v. Groff*, 49 Id. 273, and note.

USING BAILED PROPERTY CONTRARY TO AGREEMENT RENDERS BAILEE LIABLE for loss or injury thereof, although he used due care: *De Tollenere v. Fuller*, 12 Am. Dec. 616, and note. He may maintain trover for the property bailed: *Swift v. Moseley*, 33 Id. 197, which was a case where the bailee sold the property hired. So where an omnibus hired for use only in a particular place is driven with a heavy load to a different place, and damaged so as to require repairs: *Hart v. Skinner*, 42 Am. Dec. 500, and note.

THE PRINCIPAL CASE IS CITED in *Way v. Foster*, 1 Allen, 409. In that case the plaintiff admitted that the case was not distinguishable from *Gregg v. Wyman*, 4 Cush. 322, but asked that the court reconsider the question there decided, since this case had been reviewed and denied to be law in the prin-

cipal case, but the court refused to reverse *Gregg v. Wyman*, on the ground that it was the general doctrine that courts of law will not permit a party to prove his illegal acts in order to establish his case, and held, in accord with *Gregg v. Wyman*, and contrary to the principal case, that the plaintiff could not recover for injuries resulting from immoderate driving of a horse let on the Lord's day. But in *Hall v. Corcoran*, 107 Mass. 252, *Gregg v. Wyman* is overruled by a unanimous court, and the rule of the principal case, that a defendant is liable for a conversion of a horse hired on the Lord's day, was adopted. Before this, however, it had been said, in *Phila. etc. R. Co. v. Phila. etc. Steam Tow-boat Co.*, 23 How. 218, that the Massachusetts cases which did not allow a plaintiff to recover for a tort arising out of a contract made on Sunday depended on the peculiar legislation and customs of that state more than upon any general principles of justice and law, and the principal case was referred to. In *Cotton v. Sharpstein*, 14 Wis. 229, the reasoning of the principal case was preferred to that of *Gregg v. Wyman*. The principal case is cited in *Sutton v. Town of Wauwatosa*, 29 Id. 26, to the point that a defendant can not exonerate himself or claim immunity from the consequences of his own tortious act, voluntarily or negligently done to the plaintiff, on the ground that the plaintiff has been guilty of some other and independent wrong or violation of the law. Such a set-off of independent torts is not permissible. See also *Phila. etc. R. Co. v. Phila. etc. Steam Tow-boat Co.*, 23 How. 218. In *Welch v. Wesson*, 6 Gray, 505, the court cites the principal case, to the point that a party can not recover damages if in order to do so he must depend upon an illegal agreement to which he is a party, but held that this principle did not go so far as to render each of two persons engaged in the same unlawful enterprise irresponsible, during its continuance, for willful injuries done to the property of the other.

WILLSON v. WILLSON.

[25 NEW HAMPSHIRE, 229.]

DAMAGES FOR BREACH OF COVENANTS OR SEISIN, for quiet enjoyment, of good right to convey, and of warranty can not exceed the amount of the consideration of the conveyance, with interest thereon and the costs of the suit attending the eviction; and where the grantee's loss has been actually less, he is limited to the amount of injury sustained.

INCREASED VALUE OF LAND FROM RISE IN VALUE OR IMPROVEMENTS can not be recovered as damages in an action for the breach of covenants of seisin, for quiet enjoyment, of good right to convey, and of warranty.

DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES CAN NOT EXCEED the amount paid by the grantee to extinguish the incumbrance, with compensation for his trouble and expense.

ONLY NOMINAL DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES can be recovered if the incumbrance is still contingent and no injury has been sustained by the plaintiff.

WHERE INCUMBRANCE IS CHANGED INTO TITLE ADVERSE AND INDEFEASIBLE, grantee in action for breach of covenant against incumbrances may recover as damages the amount paid for the land, with interest.

GRANTEE IN ACTION FOR BREACH OF COVENANT AGAINST INCUMBRANCES, who, though out of possession, can obtain the land by payment of a

certain sum, can recover that sum only, as otherwise he might recover the consideration money, and then obtain the estate by the payment of a smaller sum.

DEFALKT ADMITS CAUSE OF ACTION AND MATERIAL AND TRAVERSABLE ALLEGEMENTS, but not the amount of damages.

AFTER DEFALKT IN ACTION OF COVENANT DEFENDANT MAY INTRODUCE EVIDENCE tending to prove an adjustment or payment of the damages.

NEW HAMPSHIRE STATUTE PROVIDING THAT UPON DEFALKT OF PARTY judgment shall be rendered against him for such damages as, upon inquiry, the plaintiff shall appear to have sustained, contemplates the reception of evidence upon the question of damages after a default.

COVENANT by Jane Willson against John Willson to recover damages for an alleged breach of covenants contained in a conveyance of land made by the defendant to plaintiff and her husband, since deceased. After answer, the action was defaulted. And after default, the defendant moved to be heard on the question of damages. The consideration recited in the deed was six hundred dollars. The defendant offered evidence of an adjustment and payment or part payment of the damages made by the defendant to plaintiff's husband, Stephen Willson. The payment consisted of an agreement that a note amounting to about six hundred dollars, held by the defendant against Stephen, should be to the extent of its amount a discharge of the damages. This evidence was objected to as inadmissible after default. The rule of damages was also in question. The parties agreed to submit these questions to this court for decision, and stipulated that upon their determination the default be stricken out, and judgment rendered in accordance therewith.

Bellows, for the plaintiff.

Cooper, for the defendant.

By Court, GILCHRIST, C. J. In relation to the rule of damages in covenants like those in the present case, it is to be noticed that here there is no allegation of fraud, nor is the matter complicated by the fact that the consideration actually paid is different from that expressed in the deed. The conveyance contains five covenants: of seisin, for quiet enjoyment, of good right to convey, of general warranty, and of warranty against incumbrances. Does the same rule of damages apply upon a breach of each of these covenants? Are the damages in each case of such a different nature that one rule is not applicable to all? and if so, what reason exists for the distinction? These questions necessarily arise upon the case before us.

There has been but little conflict in the decisions in this country as to the true rule of damages upon a breach of the covenant of seisin. It is important that there should be a certain measure of damages, and that their extent should be limited. A rule rigid in limiting the plaintiff to a definite sum in one class of cases, but flexible and yielding to equitable considerations in cases of apparent hardship, can not be applied in practice without incurring the danger of committing great injustice. The judgment of the supreme court of New York, in the case of *Pilcher v. Livingston*, 4 Johns. 1 [4 Am. Dec. 229], has recommended itself to other tribunals by the simple and safe rule it established, and by the good sense of its reasoning. In that case an action was brought to recover damages for a breach of the covenant of seisin, and for quiet enjoyment. It was held that the plaintiff was entitled to recover as damages only the amount of the consideration expressed in the deed, with the interest thereon, and the costs of the suit attending the eviction. Van Ness, J., said that the covenant of seisin which related to the title was the principal and superior covenant, to which the covenant for quiet enjoyment, which went to the possession, was inferior and subordinate, and that no case could occur where the grantee could recover a greater amount in damages for the breach of the latter than of the former. The opinion of Spencer, J., was, that under the covenant for quiet enjoyment, the plaintiff might recover the value of the improvements he had made upon the premises. The reasoning both of Kent, C. J., and of Van Ness, J., was, that there was a strong analogy between the covenant for quiet enjoyment and the ancient covenant of warranty, and that as in the latter the satisfaction recovered in land was to be equivalent to the value of the lands granted as it existed at the time when the covenant was made, the court was bound to adopt a correspondent rule when satisfaction was sought to be recovered in money in a personal action on the covenant for quiet enjoyment. Kent, C. J., said that it was a necessary consequence of the judgment of the court in the case of *Staats v. Ten Eyck*, 3 Cai. 111 [2 Am. Dec. 254], that the increased value of the land could not be recovered under either of those covenants; that when the covenant for quiet enjoyment followed a covenant of seisin in the same deed, the intent of the instrument taken together appeared manifestly to be that the one covenant was merely auxiliary to the other, as the one covenant related to the title, and the other to the future enjoyment of that title; that the

covenant for quiet enjoyment respected the possession merely, and it would seem to be unreasonable and very inconsistent for the plaintiff to recover under one covenant the whole value of the estate as it was intended to be conveyed, and under another covenant in the same deed distinct and increased damages, because he was not permitted to enjoy that estate; that there was no precedent to authorize any greater recovery under the covenant for quiet enjoyment than under the covenant of seisin; that the universal silence in the books on a point which so frequently gave occasion for litigation was a strong argument to prove that no such rule existed as that contended for by the plaintiff, and that the intention of the covenant of seisin, as uniformly expounded in the English law, was only to indemnify the grantee for the consideration paid.

Whatever expectations of a rise in the value of the land purchased may exist must be confined to the purchaser. They do not constitute an element of the bargain. The contract looks to the land only, and its price, and to those matters it should be confined. Such seems to be the substance of the reasoning of the court.

In the case of *Bender v. Fromberger*, 4 Dall. 436, the action was on the covenant of seisin and of good right to convey. The standard of damages upon a breach of the latter covenant was stated in the well-considered opinion delivered by Tilghman, C. J., to be "the value of the land at the time of making the contract."

In Massachusetts, the damages upon a breach of the covenant of good right to convey are the consideration paid and interest: *Marston v. Hobbs*, 2 Mass. 433 [3 Am. Dec. 61]; *Smith v. Strong*, 14 Pick. 128.

Although the rule of damages upon the breach of the covenant of seisin has been established in this state, we have referred to other decisions upon this point because they have an incidental bearing on considering the question of the damages upon a breach of the covenant of good right to convey.

It is said by Green, J., in the case of *Moody v. Leavitt*, 2 N. H. 174, that the price paid for the land is the measure of damages in an action on the covenant of seisin. In the case of *Ela v. Card*, Id. 175 [9 Am. Dec. 46], it was held that where the covenant was broken as to part of the land conveyed, the measure of damages will be such a proportion of the purchase money and interest as the value of that part bears to the value of the land conveyed. That the price paid is the measure of damages ap-

pears also from the case of *Morse v. Shattuck*, 4 Id. 229 [17 Am. Dec. 419]. And in the case of *Parker v. Brown*, 15 Id. 188, it was held that the measure of damages for a breach of the covenant of seisin is the value of the land at the time of the conveyance.

The covenant of good right to convey has been called synonymous with the covenant of seisin; it certainly follows as a necessary consequence that a person who is seised has a right to convey the estate of which he is so seised: *Ricker v. Snyder*, 9 Wend. 422. The line which separates the damages in the different covenants is sometimes rather indefinite, but still the more intelligible mode will be to consider them separately as far as practicable.

The two covenants are said to be synonymous in the case of *Willard v. Twitchell*, 1 N. H. 177. Where no land passes by the defendant's deed to the plaintiff, he has lost no land by the breach of these covenants; he has lost only the consideration he has paid for it. This he is entitled to recover, with interest: *Bickford v. Page*, 2 Mass. 455, 461; *Chapel v. Bull*, 17 Id. 213; *Jenkins v. Hopkins*, 8 Pick. 346.

But where the grantee's loss has been actually less, he has been limited to the amount of injury sustained. Where the grantee purchased in an outstanding paramount title, as he had been all the time in possession, he was allowed to recover only the amount paid to perfect the title, with interest from the time of payment: *Spring v. Chase*, 22 Me. 502 [39 Am. Dec. 595]. Where the defendant, being tenant for life with remainder over, conveyed with a covenant of seisin in fee, in an action on this covenant, the plaintiff, having been in possession from the time of the conveyance, was allowed to recover only the consideration paid, without interest, deducting therefrom the value of the life estate: *Tanner v. Livingston*, 12 Wend. 83. So where the grantor was not seised at the execution of the deed, but subsequently acquired a title which inured to the grantee by estoppel, he not having been disturbed in his possession, it was held that he could recover nominal damages only: *Baxter v. Bradbury*, 20 Me. 260 [37 Am. Dec. 49]. The court said that the rules established to determine the measure of damages have been framed with a view to give the party entitled a fair indemnity for the damages he has sustained. So the defendant may show in reduction of damages that the part to which there was no title was included in the deed by mistake, and that no consideration was paid for it: *Barns v. Learned*, 5 N. H. 264. But whether the covenant of

good right to convey is or is not strictly synonymous in all cases with the covenant of seisin, all the authorities concur in applying the same rule of damages in both cases.

As to the covenant against incumbrances, it is said by Parker, C. J., in the case of *Loomis v. Bedel*, 11 N. H. 87, that where the grantee has extinguished the incumbrance he can recover no greater sum than the amount paid, with compensation for his trouble and expenses. And there are authorities which hold that he can not recover even the amount thus paid, where it exceeds the consideration money and interest: *Dimmick v. Lockwood*, 10 Wend. 142. The rule of damages varies from a nominal sum to the consideration money and interest, and it is impossible to apply a rule which shall comprehend all cases of damages arising from the existence of an incumbrance. To a certain extent, however, the cases may be classified, and then the rule of damages is simple and easy of application.

It seems to be well settled that if the incumbrance is still contingent, and no injury has been sustained by the plaintiff, he can recover only nominal damages: *Delavergne v. Norris*, 7 Johns 358 [5 Am. Dec. 281]; *Stanard v. Eldridge*, 16 Id. 255; *Baldwin v. Mann*, 2 Wend. 399 [20 Am. Dec. 627]; *Jenkins v. Hopkins*, 8 Pick. 350; *Leffingwell v. Elliot*, Id. 455 [19 Am. Dec. 343]; *Tufts v. Adams*, Id. 547; *Brooks v. Moody*, 20 Id. 474.

Where the incumbrance has been removed, the general rule in Massachusetts fixes the damages at the amount paid to remove the incumbrance. The court say: "The rule is that for such incumbrances as a covenantee can not remove, he shall receive a just compensation for the real injury resulting from the incumbrance:" *Batchelder v. Sturgis*, 3 Cush. 201. Where the incumbrance is changed into a title adverse and indefeasible, the plaintiff is entitled to recover the money he has paid for the land, with interest. In such case the estate conveyed is entirely defeated, and the purchaser can not remove the incumbrance, nor can he enter upon and enjoy the land, and it would be idle to require him to purchase it in order that he might be entitled to his damages for the breach of the covenant against incumbrances. Indeed, such a state of facts comes very near proving an actual eviction, and falls short of it only because there has been no actual possession by the grantee so that he can be evicted: *Jenkins v. Hopkins*, 8 Pick. 349. The case of *Chapel v. Bull*, 17 Mass. 221, decided that where a tenant in common sold his purpart, covenanting against incumbrances, while pro-

ceedings in partition were pending, and the land was exposed to auction by the sheriff and sold, there was a breach of the covenant against incumbrances, and that the measure of damages was the consideration money and interest. It is said by the court in *Jenkins v. Hopkins*, that the principle which constitutes a difference between the case of *Chapel v. Bull* and the cases in which it has been held that for a breach of the covenant against incumbrances, nominal damages only can be recovered unless the incumbrance has been removed, is, that in the latter case the plaintiff is in possession of the estate, is undisturbed in the enjoyment and may remain so; whereas in the former case the plaintiff is not in possession, nor can he enter without being a trespasser upon one who has the title, and who is presumed to be in possession according to his title.

But where such circumstances exist as enable the plaintiff, although out of possession, to obtain it by the payment of a certain sum, he can recover that sum only, as otherwise he might recover the consideration money, and then obtain the estate by the payment of a smaller sum: *Tufts v. Adams*, 8 Pick. 549. In this case, the land was incumbered by a mortgage, and Parker, C. J., said that it appeared reasonable that the proper rule of damages should be to give the amount due upon the mortgage, with the costs of the suit upon the mortgage against the plaintiff, and thus he will be enabled to redeem the lands from the funds of the defendant. If he should not redeem, but suffer the equity to be foreclosed, then if there shall be any loss he will have no right to complain. In the case of *White v. Whitney*, 3 Met. 89, it was said by the court that where there is a paramount title by an outstanding mortgage very small in amount in comparison with the value of the estate, it would be plainly for the interest of the owner and holder of the equity of redemption to redeem. In such case it would be quite unreasonable to hold that the covenantee on such an eviction should recover damages to the full value of the estate.

So far as a party can be indemnified by applying a general rule to cases arising under this covenant, it would probably be as little productive of injustice to adopt as the measure of damages the sum paid to remove the incumbrance, where it did not exceed the consideration money and interest. The damages should be proportioned to the actual loss stated in the declaration and proved. It is held in New York that the purchaser can not recover beyond the consideration and interest and costs: *Dimmick v. Lockwood*, 10 Wend. 142.

In actions arising upon the covenants of warranty and for quiet enjoyment, it has been held by high authority that the plaintiff is entitled to recover the value of the land only at the time of the purchase: *Staats v. Ten Eyck*, 3 Cai. 111 [2 Am. Dec. 254]. Kent, C. J., said that the rule at common law on a warranty on a writ of *warrantia chartæ* was that the defendant recovered in compensation only for the land at the time of the warranty made, and that he did not find that the law had been altered since the introduction of personal covenants. In the United States the two covenants are treated as synonymous, with some exceptions; and the measure of damages is the same in both. But upon the question, what shall be the measure of damages, there is much conflict among the authorities. If we treat these covenants as similar in principle to the ancient warranty, where the warantee recovered of the warrantor lands whose value was computed as at the time of the warranty, we shall be limited by the consideration and interest. But if we consider the covenants as contracts of indemnity, we shall open up the question whether the plaintiff should recover for the increased value of the premises consequent upon a rise in price of the property, or upon the improvements made upon the land since the date of the deed.

The value of the land at the time of the eviction is the measure of damages, in Connecticut: *Sterling v. Peet*, 14 Conn. 245; in Vermont: *Park v. Bates*, 12 Vt. 387 [36 Am. Dec. 347]; and in Massachusetts: *Gore v. Brazier*, 3 Mass. 523 [3 Am. Dec. 182]; *White v. Whitney*, 3 Met. 89; and in Maine: *Hardy v. Nelson*, 27 Me. 525. The decision in *Gore v. Brazier* was said there to be "conformable to principles of law applied to personal covenants broken, to the ancient usages of the state, and the decisions of our predecessors, supported by the practice of the legislature."

In this state, the question whether the measure of damages should be the value of the land at the time of the ouster or at the time of the purchase has been discussed to some extent, but left unsettled: *Loomis v. Bedel*, 11 N. H. 87.

In New York, in the case of *Staats v. Ten Eyck*, 3 Car. 111 [2 Am. Dec. 254], it was held that under the covenant for quiet enjoyment, the plaintiff was not entitled to recover any damages on account of the increased value of the land. In the subsequent case of *Pitcher v. Livingston*, 4 Johns. 1 [4 Am. Dec. 229], the same doctrine is reaffirmed. Van Ness, J., says that "one, and perhaps the principal, reason why the increased value of the

land itself can not be recovered is because the covenant can not be construed to extend to anything beyond the subject-matter of it, that is, the land, and not to the increased value of it subsequently arising from causes not existing when the covenant was entered into;" and that for the same reason the covenantee ought not to recover for the improvements; also, that if the increase of value ought to be taken into view, by parity of reasoning it would be proper, and what would be required by a just reciprocity, to take into consideration any contingent diminution of value, which was never heard of. He further says, that when the deed contains both the covenant of seisin and for quiet enjoyment, and there is an eviction occasioned by a total want of title in the grantor, upon the other doctrine, if the property at the time of eviction be worth one half of the consideration and interest, the grantee may, notwithstanding, upon the covenant of seisin recover the whole consideration and interest. But if the property happen to be worth double the consideration money and interest, by reason of the improvements made thereon, he may waive the covenant of seisin and resort to the covenant for quiet enjoyment, and then recover the whole amount; and that this is not reconcilable with any principle of law or justice. He considers the covenant for quiet enjoyment as more strictly analogous to the ancient covenant of warranty than any of the other modern covenants. The same view of the law is taken by Kent, C. J., and by the rest of the court, excepting Spencer, J., whose opinion was that the plaintiff should recover the value of the improvements. This case was followed by *Bennet v. Jenkins*, 13 Johns. 50; *Kinney v. Watts*, 14 Wend. 38; and by *Peters v. McKeon*, 4 Denio, 550.

The decisions which agree with this view of the law are far more numerous than those on the other side, but it is not necessary to refer to them particularly. We do not assume that this measure of damages will always afford a perfect remedy. But it is predictable of every general rule that it will not suit all cases. It is truly said by Kent, C. J., in *Pitcher v. Livingston*, 4 Johns. 21 [4 Am. Dec. 229], that "on a subject of such general concern and of such momentous interest as the usual covenants in a conveyance of land, the standard for the computation of damages, whatever that standard may be, ought, at least, to be certain and notorious. The seller and the purchaser are equally interested in having the rule fixed." And this rule has the benefit of certainty. The equity of a contrary rule is very questionable. Let us suppose that after a sale the land

increases in value, either by a rise in its price or by the improvements made upon it by the purchaser. A third person recovers the land by a paramount title, and the buyer sues the seller on the covenants in his deed. He recovers the value of the land at the time of the eviction. He loses nothing, the seller pays for the improvements, and the owner alone profits by the transaction. Now there may be no *mala fides* in any one of the parties, and the case supposed is not an extreme one. It will happen where the parties act in good faith, and the owner happens for a time to be ignorant of his legal rights. The other rule, which makes the consideration paid the measure of damages, has at least the recommendation of dividing the loss between the buyer and the seller, for the seller loses the consideration, and the buyer loses the value of the improvements.

We have no disposition to extend our references to authorities upon this point, for the reasoning is exhausted by the leading cases we have cited. But we may add that in 4 Kent's Com. 477, the learned author says: "The ultimate extent of the vendor's responsibility under all or any of the usual covenants in his deed is the purchase money, with interest, and this I presume to be the prevalent rule throughout the United States." We think it the better rule, and as such it must govern the present case.

The other question in the case is, whether after a default the defendant may introduce evidence tending to prove an adjustment or payment of the damages. The default admits the cause of action, and the material and traversable averments: *Bates v. Loomis*, 5 Wend. 134. The amount of damages is not admitted: *Brill v. Neele*, 1 Ch. Rep. 619. Now the very question to be determined is, what damages the plaintiff should recover. It would be singular if, merely because of a default which does not admit any particular sum, the defendant could not show that whatever damages had been sustained by the plaintiff had been adjusted and paid in whole or in part. Our practice is to submit the question of damages to the jury, or to assess the damages upon affidavits laid before the court, at the election of the parties. We see no objection to the reception of competent evidence after a default, upon this point, and the only question made is whether any evidence is admissible after the default. No question is made by the case concerning the admissibility of this evidence, and whether before or after the default makes no difference. It is as competent in the one case as in the other.

It may be added that section 3, chapter 186, revised statutes, provides that upon the default of a party, judgment shall be rendered against him for such damages as, upon inquiry, the plaintiff shall appear to have sustained. This provision evidently contemplates the reception of evidence after a default.

Judgment for the plaintiff.

MEASURE OF DAMAGES FOR BREACH OF COVENANT OF SEISIN is consideration money paid and interest thereon: *Swafford v. Whipple*, 54 Am. Dec. 498, and note citing prior cases. So in case of a breach of warranty: *Davis v. Smith*, 48 Id. 279, and note. So in case of covenant to convey when the covenantee has been put in possession and evicted: *Thompson's Ex'r v. Guthrie's Ex'r*, 33 Id. 225, and note citing prior cases. So generally in case of personal covenants in deed: *Logan v. Moulder*, Id. 338, and note citing prior cases. So in case of covenant against incumbrances, where the incumbrance is changed into indefeasible title: *Patterson v. Stewart*, 40 Id. 586. Otherwise it is the amount paid to remove the incumbrances, with interest, but in no case can the damages exceed the purchase money and interest: *Foote v. Burnet*, 36 Id. 90, and cases cited in the note. But counsel fees of the grantee may form a part of the damages, where the grantee has commenced and lost an action involving the existence of an incumbrance: *Andrews v. Davison*, 43 Id. 606, and note citing other cases. In *Messer v. Oestereich*, 52 Wis. 695, the court hold, citing the principal case, that for the breach of covenants of ownership, seisin, power to sell, and for quiet enjoyment, the measure of damages is the consideration money and interest for so long a time as he is obliged to pay mesne profits, and includes also the costs of the ejectment that may be brought against him. The principal case is also cited in that case, to the point that the rule of damages awarding the consideration and interest has been extended in several states to covenants against liens and incumbrances.

JUDGMENT BY DEFAULT CURES NO OTHER DEFECTS THAN THOSE OF FORM:
Whipple v. Fuller, 29 Am. Dec. 330.

AFTER DEFAULT DEFENDANT MAY INTRODUCE EVIDENCE TENDING TO PROVE ADJUSTMENT or payment of the damages. The principal case is cited to this point in *Briggs v. Sneyhan*, 45 Ind. 22.

CUTTER v. BUTLER.

[25 NEW HAMPSHIRE, 343.]

MARRIED WOMAN'S WILL DISPOSING OF HER FREEHOLD ESTATES IS VOID at common law.

MARRIED WOMAN MAY DEVISE LANDS BY INSTRUMENT IN NATURE OF WILL when they are placed in the hands of trustees subject to her disposal by will.

MARRIED WOMAN MAY DEVISE REAL ESTATE UNDER NEW HAMPSHIRE STATUTE, by will proved in probate court, and the power thus given extends to all lands, tenements, and hereditaments, and all rights thereto and interests therein, whether legal or equitable.

MARRIED WOMAN MAY, IN EQUITY, BEQUEATH LIKE FEME SOLE whatever property she may be entitled to hold in her own right and to her own separate use, and this is enacted by a New Hampshire statute under which no trustee is necessary; but the husband can convey to his wife only through the medium of a trustee, and the equitable estate so conveyed would be equally at the disposition of the wife by her will.

PROVISION OF STATUTE THAT EVERY PERSON OF AGE AND OF SANE MIND may dispose of his property by will has never been held to apply to the case of married women.

IN NEW HAMPSHIRE MARRIED WOMAN CAN NOT MAKE VALID WILL OF PROPERTY HELD IN AUTRE DROIT as executrix, for by statute marriage extinguishes the trust of an executrix or administratrix.

AT COMMON LAW MARRIED WOMAN MAY MAKE WILL—1. Of property held in *autre droit* as executrix; 2. When her husband has been banished for life by an act of parliament, or is transported, or is an alien enemy; 3. Of personal property held in trust subject to her testamentary disposition; 4. Under a power contained in a settlement made in consideration of marriage or after the marriage upon a sufficient consideration; 5. Of her personal property, with her husband's consent, whether it be chattels real, choses in action, or personal chattels; 6. Of her husband's personal property if he assent.

WILL OF MARRIED WOMAN IS INEFFECTUAL WITHOUT HUSBAND'S ASSENT, where the interests or rights of the husband are affected by the will, that is, in case of a devise of chattels real or choses in action or chattels in the possession of the wife or the personal property of the husband.

CONSENT OF HUSBAND TO RENDER WIFE'S WILL EFFECTUAL must be to the particular will, and not a mere general assent.

PREVIOUS ASSENT OF HUSBAND THAT WIFE MAY MAKE WILL renders very slight evidence necessary of a subsequent assent to the particular will pursuant to the agreement.

HUSBAND'S ASSENT TO WILL OF WIFE AFTER HER DEATH is binding, and any subsequent dissent is immaterial.

ASSENT OF HUSBAND TO WILL OF WIFE MAY BE INFERRRED FROM HIS ACTS. HUSBAND'S ASSENT TO WIFE'S WILL OF PERSONAL PROPERTY that belonged to her before marriage is shown by the fact that before and during the marriage he assented that she might dispose by will of the articles in question, that the will was proved in solemn form without objection, that the husband was present when the inventory was made, and pointed out the articles which belonged to the wife, and suffered the executor to take them away without objection.

WILL OF MARRIED WOMAN MUST BE EXECUTED IN CONFORMITY TO LAW, and be proved in the probate court, whether it operates by virtue of a power or otherwise.

PROBATE WILL BE LIMITED TO PROPERTY THAT WIFE HAD POWER TO DEVISE.

PROBATE COURT HAS JURISDICTION TO DECIDE UPON PROOF OF WILL of married woman, and its decisions are conclusive upon parties and privies as to the testamentary capacity of the wife and as to the assent of the husband to the will where such assent is necessary.

Trover by Cutter, formerly husband of Hannah A. Cutter, deceased, against Butler, who, it was alleged, held certain chattels formerly the property of Hannah A. Cutter, which, upon demand by plaintiff, the defendant refused to deliver. The defendant offered evidence that the plaintiff orally consented before the marriage that Hannah should hold her property to her sole use and disposal, and after the marriage accompanied her to a magistrate that she might make her will; that memoranda were delivered to the magistrate for this purpose, but that he failed to draw up the instrument; that, however, the will of Hannah, made during her coverture, and stating that she had property to her separate use, was proved in solemn form in a court of probate, and that the defendant became her executor under the will and the decree of the probate judge, and in that capacity returned an inventory of her estate, which included the chattels in question; and that when the inventory was taken the plaintiff was present and designated to the defendant and the appraisers the chattels in question as part of the decedent's estate, and separated them from others claimed as his own; and, thereupon, without objection of the plaintiff, the defendant, as the decedent's executor, took possession of the articles. The court held that the proofs offered constituted no defense, and the defendant excepted. A verdict was rendered for the plaintiff, and the defendant moves to set it aside on the ground of that ruling.

A. F. Stevens, for the plaintiff.

Atherton and Sawyer, for the defendant.

By Court, BELL, J. At common law, a will made by a married woman, disposing of her freehold estates, was entirely void: Shep. Touch. 402; 2 Bla. Com. 497; 2 Kent's Com. 170; 4 Id. 505; 3 Com. Dig. 15, Devise, H, 3; Lov. Wills, 96; Pow. Dev. 97; Burns' Ecc. L. 49; *Marston v. Norton*, 5 N. H. 205; *Osgood v. Breed*, 12 Mass. 525; *West v. West*, 10 Serg. & R. 445; *Fitch v. Brainerd*, 2 Day, 163; *Bradish v. Gibbs*, 3 Johns Ch. 523; *Picquet v. Swan*, 4 Mason, 443.

Where her lands were placed in the hands of trustees, subject to be disposed of by will, a married woman might devise them by an instrument in the nature of a will, but which would be more properly an appointment, deriving its validity from the settlement or conveyance in trust: 2 Kent's Com. 170; 4 Id. 505; *Pridgeon v. Pridgeon*, 1 Ch. Cas. 117; *Rex v. Bellesworth*,

2 Stra. 891; *Fettiplace v. Gorges*, 3 Bro. C. C. 8; *Holman v. Perry*, 4 Met. 492; *Southby v. Stonehouse*, 2 Ves. sen. 612.

In this state, by the statute of 1845, 2 Laws, 235, a married woman is enabled to dispose of her real estate by will. Such will must, like others, be proved in the probate court. The power thus given extends to all lands, tenements, and hereditaments, and all rights thereto and interests therein, whether legal or equitable: R. S., c. 1, sec. 17.

There is, however, a proviso, that such will shall in no case affect injuriously the rights acquired by the husband in any estate so devised, by virtue of the marriage contract. No statute has been passed here giving to married women the general power to dispose of personal property by will.

By the revised statutes, c. 149, sec. 3, it is provided that whenever any married woman shall be entitled to hold property in her own right and to her own separate use, she may dispose of said property by will, as if she were sole and unmarried.

The principle declared by this statute has long been an admitted principle in equity: *Peacock v. Monk*, 2 Ves. sen. 190; *Fettiplace v. Gorges*, 1 Ves. jun. 46; S. C., 3 Bro. C. C. 8; *Rich v. Cockell*, 9 Ves. 369; and in the ecclesiastical courts: *Tappenden v. Walsh*, 1 Phill. 352; *Spitty v. Bayly*, 16 Jur. 92; S. C., 9 Law & Eq. 570; and may well be regarded as merely declaratory of the common law: 2 Kent's Com. 170; *Holman v. Perry*, 4 Met. 492; *West v. West*, 3 Rand. 373; *Emery v. Neighbour*, 2 Halst. 142 [11 Am. Dec. 541]; *Strong v. Skinner*, 4 Barb. 546; *American Home Missionary Society v. Wadhams*, 10 Id. 597.

By the statute of 1846, c. 327, 2 Laws, 307, married women have the same rights as they would have if unmarried as to all such property as may have been secured to them to their own sole and separate use by a written contract entered into before marriage, or which may have been conveyed or devised to such married woman for such sole and separate use after the marriage. Under this statute no trustee for the wife is usually necessary. But as the husband is not empowered to convey any of his property to his wife in any other manner or with any other effect than he could do before the passage of the act, his conveyances must be made as at common law, through the medium of a trustee. But the equitable interest so conveyed would be equally at the disposition of the wife by her will as her legal estates, if the conveyance is in other respects valid: 1 Bla. Com. 442; 2 Kent's Com. 129; R. S., c. 1, sec. 17.

By the revised statutes, c. 149, sec. 3, when any husband shall

have deserted his wife, and remained absent for three months without making provision for the support of herself and her children; or when any cause of divorce exists, or any facts which, if continued, may be such cause, and the wife is the injured party, she will be entitled to hold in her own right and to her separate use any property acquired by her by descent, legacy, or otherwise, and may dispose of the same without the interference of her said husband or of any person claiming under him. And by section 4, if any woman, being the wife of an alien, or of a citizen of any other state, shall have resided in this state for the term of six months successively, separate from her husband, she may acquire and hold property in her own right, etc.

No other provisions of the statutes of New Hampshire are recollect ed which apply to the wills of married women. Section 1 of chapter 156 of the revised statutes might seem broad enough to include the case of married women. "Every person of the age of twenty-one years, and of sane mind, may devise and dispose of his property, real and personal, and of any right or interest he may have in any property, by his last will in writing." But it has never been held to apply to the case of married women: *Marsdon v. Norton*, 5 N. H. 205; *Osgood v. Breed*, 12 Mass. 525; *Anonymous*, Dyer, 354; Pow. Dev. 140; *Morse v. Thompson*, 4 Cush. 562.

The cases which do not fall within these statutes must of course stand upon the general grounds of the common law. The following cases are recognized in the books, which have come under our observation, in which at common law a married woman may make a will:

1. A married woman, executrix, might make a valid will of the personal property held by her *in autre droit* as such executrix: Shep. Touch. 402; God. Orph. Leg. 110; Plowd. 526; Fitzh. Abr., Executor, 109; 2 Bla. Com. 497; 3 Com. Dig. 15, Devises, H, 3; Lov. Wills, 166; and without her husband's consent: *Scammell v. Wilkinson*, 2 East, 552; *Slow v. Drinkwater*, Lofft. 83. But by the revised statutes, c. 158, sec. 9, marriage extinguishes the trust of an executrix or administratrix, and this case can never arise here.

2. A woman whose husband has been banished for life by an act of parliament may make a will: Co. Lit. 133 a; Shep. Touch. 402; *Portland v. Prodgers*, 2 Vern. 104; *Compton v. Collinson*, 2 Bro. C. C. 385; *Ex parte Franks*, 1 Moo. & S. 1. So if her husband is transported: *Newsome v. Bowyer*, 3 P. Wms. 37; *Goods of Martin*, 15 Jur. 686; S. C., 5 Law & Eq. 586; or

is an alien enemy; *Deerly v. Mazarine*, 1 Salk. 116; Lov. Wills, 266. Cases may perhaps arise here within the principle of these cases.

3. Personal property may be holden in trust, subject to the disposal of a married woman by her will, which she may not be entitled to hold in her own right nor to her separate use, so as to bring her case within the terms of the revised statutes, c. 149, before cited. In such case her will relating to such property will be valid and effectual by virtue of the power, as in the case of real estate at common law before stated, not as a will strictly, but as an appointment in nature of a will: 2 Kent's Com. 170; 4 Id. 505; Lov. Wills, 266; *Southby v. Stonehouse*, 2 Ves. sen. 610; 2 Bla. Com. 497. But still such will, to be effectual, must be proved in the court of probate: Lov. Wills, 266; *Stone v. Forsyth*, 2 Doug. 707; *Cothay v. Sydenham*, 2 Bro. C. C. 391; *Osgood v. Breed*, 12 Mass. 525.

4. The husband may agree with the wife, or with one of her friends as trustee for her, either before the marriage or after the marriage, upon a sufficient consideration, 1 Roper H. & W. 169, to allow her to dispose of certain property, or of a certain amount of personal property by will; and such an agreement will be held binding upon the husband in equity, and her will will be held valid as an appointment under the power given her by such contract, and that without the assent of her husband: Lov. Wills, 266; *Newburyport Bank v. Stone*, 13 Pick. 420; *Tylle v. Peirce*, Cro. Car. 376. Such a will, it is said, can not be proved, as such, without the assent of the husband, but it may be proved as a testamentary paper, and will derive its effect from the agreement of the husband, who will be held to its specific performance: 2 Roper H. & W. 188; 2 Bla. Com. 498; *Stone v. Forsyth*, 2 Doug. 707, note.

If a married woman has any pin-money or separate maintenance, she may dispose of her savings thereout by any writing, in the nature of a will, without her husband's consent: Lov. Wills, 266; 2 Bla. Com. 498; *Herbert v. Herbert*, Prec. Ch. 44.

5. By the assent of the husband, the wife may devise her chattels real: 2 Bla. Com. 497; D. & S. 1 Ch. 7. The phrase "real estate," in the statute of 1846, is sufficiently comprehensive to include this class of interests, but they are excluded from the operation of this statute by the proviso before referred to. Such chattel interests, at common law, survive to the husband, if he outlives his wife: 2 Kent's Com. 134; Went. Ex. 196; 2 Bla. Com. 497; *Ognel's Case*, 4 Co. 51; *Moody v. Matthews*, 7 Ves.

183; and her will, if carried into effect, must therefore injuriously affect his interest in relation to them. Her will as to these is valid on common-law principles only.

6. She may dispose, by her will, of her choses in action, including debts and contracts due to her, and her right of action for goods carried away (*biens asports*) before the marriage by a like assent on the part of the husband: *Johns v. Rowe*, Cro. Car. 106; *Finch v. Finch*, Moore, 339; S. C., 2 And. 91; *Brook v. Turner*, 1 Mod. 211; *Scammell v. Williamson*, 2 East, 552; *Stevens v. Bagwell*, 15 Ves. 139; *Shep. Touch.* 402; 2 Bro. Abr., Testament. Such interests the husband, besides his right to collect or assign them at his pleasure, during the life of the wife, has a right to claim for his own benefit after her decease, subject, however, to the burden of administering her estate, and to the payment of her debts: 2 Kent's Com. 135; 2 Bla. Com. 515; *Whittaker v. Whittaker*, 6 Johns. 112; Went. Ex. 197.

7. She may, by her husband's assent, bequeath by will the personal chattels in possession, which belonged to her at her marriage, or which have fallen to her afterwards. These, by the policy of the old law, became, instantly upon the marriage, or upon their subsequent acquisition, the absolute property of the husband: Co. Lit. 351-356; 2 Kent's Com. 143; Went. Ex. 196; Lov. Wills, 266. This ancient policy is in itself both unjust and absurd; and at the present time the right of the husband to this kind of property, as well as to the wife's choses in action, is regarded rather as a marital right, which he may insist upon or waive, as he pleases, and which if he does waive, the goods, as between him and her representatives, remain the property of the wife. Such waiver may be shown by an agreement on the part of the husband, either before or after the marriage, that the property should remain hers, or that he should allow her to dispose of it by will, or by any agreement by which it should appear that the right of the property as between them is to remain in the wife: 1 Roper H. & W. 169; *Estate of Wagner*, 2 Ashm. 448; *Parsons v. Parsons*, 9 N. H. 321 [32 Am. Dec. 362]; *Marston v. Carter*, 12 Id. 164; *Wheeler v. Moore*, 13 Id. 481; *Coffin v. Morrill*, 22 Id. 352.

8. The wife, without any previous agreement, or any claim to the property which can be directly shown, may assume to dispose by her will of the personal property of the husband; and if the husband afterwards voluntarily assents to such will, it will be effectual to pass the property, and will be a good and valid will, on the ground that such assent is evidence of an

agreement between them, that the wife should have a right to make such disposal of the property, and of competent authority given by him to her to make it: *Swin. Wills*, 89; *1 Rob. Wills*, 23; *Shep. Touch.* 402; and *1 Bro. Abr.* 236, *Devise*, 34, where it is said a *feme covert*, by the assent and will of her husband, made a will, and devised the half of the goods of her husband and made her executor, who proved the will by the assent and will of the husband, and [her will was held] good. Otherwise, it seems, if the husband prohibit the proving of the wife's will after her death; for then the whole is void, for the husband may countermind it. And this happened at St. Albans, in the 24 Hen. VIII.

Several of these cases agree in one respect, and stand upon the same reason. In these, the will operates directly to affect the rights of property of the husband, though not in all to the same degree. These are the devise of the chattels real and of the choses in action of the wife, of the chattels in possession of the wife, and of the personal property of the husband, where the will does not take effect by virtue of any power of appointment.

In these cases the property is either in part or absolutely and entirely the property of the husband, and the title to it under the will of the wife, so far as it affects his interest, passes from him to the legatee, and it is his gift: *Brook v. Turner*, 1 Mod. 211; *Went. Ex.* 196; *Shep. Touch.* 402; *Peacock v. Monk*, 1 Ves. sen. 127; *Pow. Dev.* 164; *Osgood v. Breed*, 12 Mass. 525. Where the interest or rights of the husband are thus affected by the will of the wife, it is settled by decisions of the courts, too often repeated to be disregarded, that the will of the wife is entirely ineffectual without the assent of the husband: *Johns v. Rowe*, Cro. Car. 106; *Richardson v. Seise*, 12 Mod. 306; *Sharde-low v. Naylor*, 1 Salk. 313; *1 Rob. Wills*, 23; *Ognel's Case*, 4 Co. 48; *Lov. Wills*, 266; *2 Bla. Com.* 497; *2 Kent's Com.* 170.

It therefore becomes material to inquire what is a sufficient assent of the husband to render such a will effectual. The following principles may, we think, be fairly deduced from the cases and books which have been found to bear on the subject:

A general assent that the wife may make a will is hardly sufficient. There must ordinarily be evidence of an assent to the particular will which is made by the wife: *1 Roper H. & W.* 169; *King v. Bettesworth*, 2 Stra. 891; *2 Bla. Com.* 497; *1 Bro. Abr.*, *Devise*, 34.

If there is a previous assent or agreement of the husband

that the wife should make a will, very slight evidence of assent afterwards to a will in accordance with such agreement will be sufficient: 1 Roper H. & W. 169; *Brook v. Turner*, 2 Mod. 170.

At one period it was held that the husband must assent at the time of the probate: Swin. Wills, pt. 2, sec. 9, pl. 10; 1 Burns' Ecc. L. 52; *Henley v. Philips*, 2 Atk. 49; *Brook v. Turner*, 1 Mod. 211; and might revoke his assent at any time during his wife's life, or after her death, before probate: 1 Roper H. & W. 169; Swin. Wills, 89; 1 Burns' Ecc. L. 52; *Brook v. Turner, supra*. But it is now held that if the husband assent to the will after the death of the wife, he will be forever bound, and any subsequent dissent will be immaterial: 1 Rob. Wills, 23; 1 Roper H. & W. 169; *Maas v. Sheffield*, 10 Jur. 417.

The husband's assent may be shown by circumstances as well as by direct proof: 1 Roper H. & W. 169; Lov. Wills, 266.

If after the wife's death the husband suffer the will to be proved, and deliver the goods accordingly, the testament is good: Shep. Touch. 402.

A *feme covert* devises goods, and the baron delivers the goods to the executor of the wife, the court, upon this presumption, adjudged that the baron gave precedent assent to the making of the will: 5 Edw. II., cited in *Dolman v. Vavasor, Moore*, 192, pl. 341; 4 Vin. Abr. 164.

If the husband consent that his wife shall make a will, and accordingly she doth make a will and dieth, and if after her death he comes to the executor named in the will, and seems to approve her choice, by saying that he is glad she appointed so worthy a person, and seems to be satisfied in the main with the will, and recommends a goldsmith, and coffin-maker, and escutcheon painter to be employed by him, this is a good assent, and makes it a good will, though he afterwards opposed the probate. His disagreement, after his former assent, will not avoid the will, because such assent is good in law, though he knew not the particular bequests in the will: *Brook v. Turner*, 2 Mod. 170; S. C., 3 Keb. 624, pl. 3; S. C., 4 Vin. Abr. 164.

A married woman made her will with the consent of her husband, expressed at the time, and testified by his being a subscribing witness to it. After her death, but before probate, he obtained the will, for an alleged particular purpose, from the alleged universal legatee therein named, giving the legatee at the time a written memorandum containing his sanction of the will. Subsequently he took out letters of administration to his wife as dead intestate. It was held he could not withdraw his

assent so given, and that an allegation pleading the above facts, and others in connection, was admissible on the part of the universal legatee seeking to establish the will: *Maas v. Sheffield*, 10 Jur. 417, cited in 5 Harr. Dig. 1654.

In Vermont, it is held that the assent of the husband to the wife's will, under his hand and seal during the coverture, will be sufficient: *Fisher v. Kimball*, 17 Vt. 323.

In the present case it appeared that the property in question belonged to the wife before her marriage, and the evidence of the defendant tended to prove the assent of the husband before and during the marriage, that the wife should make a will and dispose of the articles in question; that the will was proved in solemn form without objection; that the husband was present when the inventory was made, and pointed out the articles which belonged to the wife, and suffered the executor to take them away without objection. This evidence, if believed, would have been proof of assent entirely sufficient.

It is now well settled that the will of a married woman, whether it operates by virtue of a power or otherwise, is so far of the nature of a will strictly, that it must be executed in conformity to law: *Casson v. Dade*, 1 Bro. C. C. 99; and it must be proved in the court of probate: *Brook v. Turner*, 1 Mod. 211; *Stone v. Forsyth*, 2 Doug. 707; *Ross v. Ewer*, 3 Atk. 156; *Jenkins v. Whitehouse*, 1 Burr. 431; *Cathay v. Sydenham*, 2 Bro. C. C. 392; *Rich v. Cockell*, 9 Ves. 369; 2 Roper H. & W. 188; Lov. Wills, 266; *Osgood v. Breed*, 12 Mass. 525; *Newburyport Bank v. Stone*, 13 Pick. 420; 4 Kent's Com. 505; *America: Home Missionary Society v. Wadham*, 10 Barb. 606; *Picquet v. Swan*, 4 Mason, 443.

The probate, if the will embraces different kinds of property, as in this case, will be limited to the property which the wife had the power to devise: *Tappenden v. Walsh*, 1 Phill. 352; *Moss v. Brander*, Id. 254.

The court of probate has, consequently, jurisdiction to decide upon the proof of the will; and having such jurisdiction, its decisions are binding and conclusive upon parties and privies, as to the testamentary capacity of the wife, so far as relates to the property devised: *Osgood v. Breed*, 12 Mass. 525; *Bryant v. Allen*, 6 N. H. 116; and as to the assent of the husband to the will, where such assent is necessary to give it effect; and it would seem, as to his assent, that the particular property should pass by the will, so far as it is set forth and described in the will. If the husband designs to controvert either of these

things, the time and place appointed for that purpose by the law would seem to be the courts of probate at the time of the allowance of the will, and not afterwards nor elsewhere. However this may be, the evidence offered in this case was competent to establish a good defense, and the verdict must be set aside.

POWER OF MARRIED WOMAN TO MAKE WILL.—The statute of wills, 32 Hen. VIII., first gave the right of devising lands. The right of bequeathing personalty is very ancient. After uses were invented they began to be devised, and equity compelled the execution of the devise. Soon after they were abolished by the statute of uses, the statute of wills was enacted, which provided that all persons being seised in fee simple might by writing devise two thirds of their lands, tenements, and hereditaments held in chivalry, and the whole of those held in socage. Some question as to whether married women were included under this act having arisen, a second statute was enacted, 34 & 35 Hen. VIII., which expressly excluded from the privilege of deviating realty *femes covert*, infants, idiots, and lunatics. These statutes became the common law of this country upon the settlement of the colonies. It will be observed that the question of a married woman's power to dispose by will of personalty is left open: See 2 Bishop on Mar. W., secs. 534, 535. At the Roman law a married woman might make a will like a *feme sole*: 1 Redfield on Wills, 22; 1 Williams on Ex. 52; 2 Bla. Com. 497. A married woman's power at common law to make a will is thus concisely stated by Blackstone: "Among the Romans, there was no such distinction; a married woman was as capable of bequeathing as a *feme sole*. But with us a married woman is not only utterly incapable of devising lands, being excepted out of the statute of wills, 34 & 35 Hen. VIII., c. 5, but also she is incapable of making a testament of chattels without the license of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her. It would therefore be extremely inconsistent to give her a power of defeating that provision of the law by bequeathing those chattels to another. Yet by her husband's license she may make a testament, and the husband, upon marriage, frequently covenants with her friends to allow her that license; but such license is more properly his assent, for unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will. Yet it shall be sufficient to repeal the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed. So that, in reality, the woman makes no will at all, but only something like a will; operating in the nature of an appointment, the execution of which the husband, by his bond, agreement, or covenant, is bound to allow. * * * The queen consort is an exception to this general rule; for she may dispose of her chattels by will without the consent of her lord; and any *feme covert* may make her will of goods which are in her possession *in autre droit*, as executrix or administratrix; for these can never be the property of the husband; and if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by testament without the control of her husband. But if a *feme sole* makes her will and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will:" 2 Bla. Com. 497, 498. As in the case of

ordinary wills, a will of personal property, valid at the domicile of the testatrix, will be valid anywhere, but the *lex loci rei sitae* governs in the case of real estate: *Matter of Stewart*, 11 Paige, 398.

WILL OF PERSONALTY VALID, IF MADE WITH HUSBAND'S CONSENT.—The right of the husband to the administration of his wife's personal property, and whatever other marital rights he may have in her personal property not settled to her separate use, he may waive by consenting to her will. And a will of personal property made by a married woman with her husband's consent will therefore be valid: *George v. Bussing*, 15 B. Mon. 558; *Lee v. Bennett*, 31 Miss. 119; *Emery v. Neighbour*, 6 N. J. L. 142; S. C., 11 Am. Dec. 541; *Newlin v. Freeman*, 1 Ired. L. 514; *Wagner's Estate*, 2 Ashm. 448; *Fisher v. Kimball*, 17 Vt. 323; *Brook v. Turner*, 1 Mod. 211; S. C., 2 Id. 170; *Tucker v. Inman*, 4 Man. & G. 1049; *Pamala, In Goods of*, 31 L. J. P. 158; *Reay, In Goods of*, 8 Jur., N. S., 596. This general principle has never been denied, but is universally recognized on the ground of the husband's right of waiver. But the husband's assent operates to pass only such things as do not belong to him, but to which he would have a right after the death of the wife in his capacity as her administrator. Personal property which formerly belonged to her, but was reduced to possession by him during coverture and thereby became his absolutely, does not pass by her will although he consented to it. Such a will is ineffectual to pass any property which belonged to her husband at the time of its execution: *George v. Bussing*, 15 B. Mon. 558. So choses in action while they remain such and are not reduced to possession may be disposed of by a married woman's will which receives her husband's assent, whether they are hers or held in trust for her by her husband: *Reed v. Blaisdell*, 16 N. H. 194; S. C., 41 Am. Dec. 722; *Burton v. Holly*, 18 Ala. 408. In *Burton v. Holly, supra*, and *Richards v. Clark*, 18 N. J. Eq. 327, it is held that she may will the choses in action to her husband. But this is denied in *Hood v. Archer*, 1 McCord, 225, and *In re Nowell*, 2 Id. 453, on the ground of the suspicion which would arise that the will was made under the influence of his persuasion or coercion. If made without the husband's consent, it will be void: *Anderson v. Miller*, 6 J. J. Marsh. 568; and will not be admitted to probate; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384. And though made with his consent, it must be probated to be effective: *Lee v. Bennett*, 31 Miss. 119. But the presumption in favor of continuing relation of husband and wife will not prevail to defeat the will of a female who is shown to have been once married, if the objection be not raised in the court below and an attempt made to introduce evidence to show the husband was living when the will was made: *Fatherree v. Lawrence*, 33 Miss. 585.

PROPERTY ACQUIRED AFTER HUSBAND'S DEATH DOES NOT PASS. As it was held in *George v. Bussing*, 15 B. Mon. 558, the husband's assent to the will does not give it any validity over his own property held in his own right. Her will though made with his assent can not affect any property which may become hers at her husband's death and by reason of it: 1 Williams on Ex. 52; *Stephens v. Bagwell*, 15 Ves. 139, 156; *Price v. Parker*, 16 Sim. 198; *Noble v. Phelps*, L. R., 2 P. & D., 276; *Trimmell v. Fell*, 16 Beav. 537; *Noble v. Willcock*, L. R., 8 Ch. Ap., 778; *Grimke v. Grimke*, 1 Desau. 366. In order to pass after-acquired property, she must make a new will after she becomes clothed with the powers of a *feme sole* by her husband's death. Her former will made by her in her limited capacity of *feme covert* is limited and constrained within the bounds within which her husband's assent could authorize her to perform a valid testamentary act. As he could not empower her to will his own property, although if she should survive him she might become entitled to it;

so still less could he authorize her to will property over which he himself had no disposing power but which she might acquire after his death: *Scammell v. Wilkinson*, 2 East, 552.

CONSENT OF HUSBAND, WHAT CONSTITUTES.—The consent of the husband may be given by parol, and either before or after the death of the wife: *Reed v. Blaisdell*, 16 N. H. 194; S. C., 41 Am. Dec. 722; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384. A dictum in *McGowan v. Jones*, R. M. Charl. 184, is to the contrary. The consent may be express or implied: *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384. In *Fisher v. Kimball*, 17 Vt. 323, the consent was in writing and under seal. But this is not necessary. The consent may be inferred from various acts of the husband showing his acquiescence. It may be manifested by the fact that the will is in his handwriting: *Grimké v. Grimké*, 1 Desau. 366; *Smelie v. Reynolds*, 2 Id. 66. In the latter case, the husband also proved the will, and held property under it until his death. By allowing the will to be probated he waives his rights in the property disposed of: *Webb v. Jones*, 36 N. J. Eq. 163. Consent is manifested by his acting as executor and proving the will: *Ex parte Fane*, 16 Sim. 406; and it may be inferred from the fact that at the execution of the will he stood by and assented and advised as to the making: *Reed v. Blaisdell*, 16 N. H. 194; S. C., 41 Am. Dec. 722; or from his taking property under the will: *Child, In Goods of*, 16 Week. Rep. 407; *Smelie v. Reynolds*, 2 Desau. 66. So from his placing money in the hands of trustees for the sole and separate use of the wife: *Emery v. Neighbour*, 6 N. J. L. 142; S. C., 11 Am. Dec. 541. The principal case furnishes another example of acts of a husband from which his consent is presumed.

The consent must be to the particular will in question. A mere general consent, that is, an authorization given by the husband to her to make a will generally, without an assent to the particular will when executed, or at the time of its execution, is insufficient: *George v. Bussing*, 15 B. Mon. 558; *Kurtz v. Saylor*, 20 Pa. St. 205; *Willock v. Noble*, L. R., 7 H. L. Cas., 580; *Noble v. Willock*, L. R., 8 Ch. Ap., 778. And it is said that an assent without knowledge of the contents of the will would be unavailing: *Willock v. Noble*, L. R., 7 H. L. Cas., 580; *Noble v. Willock*, L. R., 8 Ch. Ap., 778. And acts of acquiescence in the claims and acts of the legatees performed by the husband in ignorance of his marital right of survivorship in his wife's property will not estop him: *Hays v. Bright*, 11 Heisk. 325.

HUSBAND MAY REVOKE HIS CONSENT. The husband's consent to the will, being without consideration, may be revoked at any time before the will is probated: *George v. Bussing*, 15 B. Mon. 558; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384; *Wagner's Estate*, 2 Ashm. 448; *Brook v. Turner*, 2 Mod. 170, 172; *Maas v. Sheffield*, 1 Rob. Ecc. 364; 1 Williams on Ex. 54. But the revocation must be before the probate: *Wagner's Estate*, 2 Ashm. 448. A consent given before marriage is presumed to continue after her death unless the contrary appear: *Brook v. Turner*, 2 Mod. 170. Certainly, if the consent be proved to have been given at the time of the execution of the will, very little testimony will be required to make out a continuance of it after her death: *George v. Bussing*, 15 B. Mon. 558. And if a consent be once given after her death, though before probate, it can not be revoked: *Brook v. Turner*, 2 Mod. 170, 172; *Maas v. Sheffield*, 1 Rob. Ecc. 364.

MARRIED WOMAN MAY DISPOSE OF HER SEPARATE PERSONAL ESTATE BY WILL. Although for some time it was held that a married woman could not make a valid will of her separate real estate except under a valid power, for a

long time the doctrine has prevailed in equity that she had full power of disposition by will over her separate personal estate without her husband's consent. She may will her personal property, settled to her sole and separate use, together with its produce, and whether it be derived from her husband or a third person. The moment she takes personal property to her sole use, she has in equity the right to dispose of it, for the power of disposition is a necessary incident to the enjoyment of personal property: *Fettiplace v. Gorges*, 1 Ves. jun. 48; *Rich v. Cockell*, 9 Id. 369, 375; *Peacock v. Monk*, 2 Ves. sen. 190; *London Chartered Bank of Australia v. Lempriere*, L. R., 4 P. C., 572; *In re Crofts*, L. R., 2 P. & D., 18; *Crofts v. Middleton*, 2 Kay & J. 194; *Pride v. Bubb*, L. R., 7 Ch. Ap., 64; *George v. Bussing*, 15 B. Mon. 558; *Michael v. Baker*, 12 Md. 158; *Mory v. Michael*, 18 Id. 227; *Buchanan v. Turner*, 26 Id. 1; *West v. West*, 3 Rand. 373; 2 Bish. Mar. W., sec. 540; 1 Jarm. on Wills, 34, 35. The husband may be a trustee of property for the separate use of his wife: *Rich v. Cockell*, 9 Ves. 369; and where during the coverture he treats himself as such a trustee of certain funds by paying his wife the proceeds, her will of such property, made during coverture, will be valid: *In re Smith*, 1 Sw. & Tr. 125. Personal property acquired by her after separation is acquired to her sole use, and the *jus disponendi* attaches to it: *Haddon v. Fladyate*, Id. 48; see *Emery v. Neighbour*, 6 N. J. L. 142; S. C., 11 Am. Dec. 541. So upon an agreement to live separate and a payment by the husband to the wife of a sum of money without the intervention of trustees, the money is subject to her testamentary disposition: *McKenna v. Phillips*, 6 Whart. 571; S. C., 37 Am. Dec. 438. So where, after a woman is deserted by her husband and afterwards acquires property by her personal exertions, this is her separate estate, and she may dispose of it by will, although there is no trustee and no words of gift of any kind: 2 Bish. Mar. W., sec. 541; *Starrett v. Wynn*, 17 Serg. & R. 130; *Braham v. Burchell*, 3 Ad. Ecc. 243; see also *Elliott, In Goods of*, 40 L. J. P. 76; *Cain v. Bunkley*, 35 Miss. 119. But see *Vreeland v. Ryno*, 26 N. J. Eq. 160. It was held in Mississippi that a married woman had no power to dispose of her statutory separate estate without her husband's consent, unless a statute vested her with that power, on the ground that her powers over such property were defined and limited by statute, and she had no rights in it independent of statute: *Cain v. Bunkley*, 35 Miss. 119; see *Garrett v. Dabney*, 27 Id. 335. This, in the opinion of Mr. Bishop, 2 Bishop on Married Women, sec. 549, would not be deemed quite accurate in exposition of legal doctrine in most of our states. And when this question arose in Georgia it was decided to the contrary: *Urquhart v. Oliver*, 56 Ga. 344; see also *In re Tuller*, 79 Ill. 99; *Noble v. Enos*, 19 Ind. 72. A provision of statute regulating the disposition of married women's separate estate *inter vivos* does not affect their right to make a will, as it existed before the enactment: *Lee v. Bennett*, 31 Miss. 119.

UNDER POWER MAY WILL HER PERSONALTY AND REALTY. A married woman may make an appointment by will of personal or real property conveyed to her separate use with an express power contained in the instrument of conveyance authorizing her to do so, whether the power is contained in a marriage settlement or antenuptial agreement, or in a conveyance or will to her by a third person: *Colter v. Sayer*, 2 P. Wms. 622; *Anderson v. Miller*, 6 J. J. Marsh. 568; *George v. Bussing*, 15 B. Mon. 558; *Heath v. Withington*, 6 Cush. 497; *Holman v. Perry*, 4 Met. 292; *Newburyport Bank v. Stone*, 13 Pick. 420; *Bradish v. Gibbs*, 3 Johns. Ch. 523, 536; *Matter of Stewart*, 11 Paige, 398; *Leigh v. Smith*, 3 Ired. Eq. 442; S. C., 42 Am. Dec. 182; *Barnes v. Hart*, 1 Yeates, 221; *Barnes's Lessee v. Irwin*, 2 Dall. (Pa.) 199; S. C., 1 Am.

Dec. 278; *Porcher v. Daniel*, 13 Rich. L. 349; 4 Kent's Com. 508; 2 Bish. Mar. W., sec. 544. The statute of wills, 34 & 35 Hen. VIII., does not, as construed by the courts, prevent a married woman from devising real estate under a power of appointment: *George v. Bussing*, 15 B. Mon. 558. The power may be executed during coverture, and the heir at law will be bound although the estate is not vested in trustees: *Ela v. Edwards*, 16 Gray, 91, 101; *Barnes's Lessee v. Irwin*, 2 Dall. (P.a.) 199; S. C., 1 Am. Dec. 278; *Barnes v. Hart*, 1 Yeates, 221. An agreement made by the husband with a trustee after marriage giving to the wife a power of disposing by will of property which she owned before coverture is *prima facie* valid: *Kelly v. Kelly*, 5 B. Mon. 369. In a post-nuptial settlement by a stranger or her husband, the wife may receive a power of appointment: *Picquet v. Swan*, 4 Mason, 443.

The instrument executing the power, though in testamentary form, is not strictly a will, but an appointment under the name or in the nature of a will. Still it must, like an ordinary will, be admitted to probate before it is of any effect: *Picquet v. Swan*, 4 Mason, 461, 462; *Leigh v. Smith*, 3 Ired. Eq. 442; *Newlin v. Freeman*, 1 Ired. L. 514; *Shaw v. Dawsey*, 1 McMull. 247; *West v. West*, 3 Rand. 373; *Henley v. Philips*, 2 Atk. 48; *Stone v. Forsyth*, 2 Doug. 707; *Michael v. Baker*, 12 Md. 158. But the probate may and should limit its operation to the property embraced under the power: *Heath v. Withington*, 6 Cush. 497; *Holman v. Perry*, 4 Met. 492; *Tappenden v. Walsh*, 4 Phill. 352; *Moss v. Brander*, Id. 454; *De Pradel, In goods of*, L. R., 1 P., 454. In *Price v. Parker*, 16 Sim. 198, the will was held to be invalid, as it purported to dispose of more property than the power covered.

A will made by a married woman, having a testamentary power of appointment, must be intended to be an exercise of the power, although it contains no reference to it: *Churchill v. Dibben*, 9 Sim. 447; *Porcher v. Daniel*, 13 Rich. L. 349; *Thorndike v. Reynolds*, 22 Gratt. 21; see *Chatelain v. De Pontigny*, 1 Sw. & Tr. 411; *Kelly v. Kelly*, 5 B. Mon. 369. But in *Mory v. Michael*, 18 Md. 227, it is held that the intention to execute the power must appear in the will or it is not a valid execution of the power. A power to dispose of the increase of the property includes a power to dispose of land purchased with the income: *Porcher v. Daniel*, 13 Rich. L. 349. But see *Churchill v. Dibben*, 9 Sim. 447

Where the power is given the wife to make an appointment provided she dies in her husband's life-time, if she executes the power and then survives the husband, this execution will be of no avail and inoperative, as the power has never arisen, and she must republish the will after the husband's death to give it any effect: *Trimmell v. Fell*, 16 Beav. 537; *In Goods of Parkin*, 1 Sw. & Tr. 465; *In Goods of Wollaston*, 32 L. J. P. 171; *Noble v. Willock*, L. R., 8 Ch. Ap., 778. But if she leave no children, or the next of kin consent, the will may take effect, though not republished after the decease of the husband: *Bishop v. Wall*, L. R., 3 Ch. Ap., 194; *In Goods of Thorild*, 16 L. T., N. S., 853. But in *Thorndike v. Reynolds*, 22 Gratt. 21, it is held that a husband, who by his will gives property, real and personal, to his wife absolutely if she survives him, may by his will authorize her to make a will in his life-time disposing of said property. And the wife having made a will in the life-time of her husband, disposing of the property, and afterwards surviving her husband and dying without re-executing or revoking her will, the same is valid to pass the property to her devisees and legatees.

In *Rex v. Bettsworth*, 2 Stra. 891, it is held that though the will is valid under a power, yet the husband shall have the administration, though an executrix be appointed; for there may be choses in action not covered by the

will. See, upon the power of a married woman to dispose of her separate estate, the note to *Thomas v. Folwell*, 30 Am. Dec. 230.

POWER OF MARRIED WOMAN TO DEVISE SEPARATE REALTY.—It has been very generally held that a married woman is utterly incapacitated from devising realty. Although a husband may validate by his consent her will of personal property, he can not likewise make her will of real property effective. For though he may waive his rights in her personality, he can not by his own act divest the rights of her heir at law in her realty. She can dispose of real estate only when it is settled to her separate use in an instrument expressly reserving a power of appointment to her: *Wilkinson v. Wright*, 6 B. Mon. 576; *Osgood v. Breed*, 12 Mass. 525, 530; *Holman v. Perry*, 4 Met. 492, 496; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384; *Newlin v. Freeman*, 1 Ired. L. 514; *West v. West*, 3 Rand. 373. In Pennsylvania a married woman is to be deemed to possess no power in respect to her separate estate but what is positively given or reserved to her by the instrument creating such estate: *Wagner's Estate*, 2 Ashm. 448; *Lancaster v. Dolan*, 1 Rawle, 231; *Thomas v. Folwell*, 30 Am. Dec. 230. A power to dispose of property by deed can not be executed by a will: *Harker v. Harker*, 3 Harr. (Del.) 51. See note to *Thomas v. Folwell*, 30 Am. Dec. 230. She can not devise her realty even to her husband: *Adams v. Kellogg*, Kirby, 195; *Filch v. Brainerd*, 2 Day, 163; *Marston v. Norton*, 5 N. H. 205. But in *Bradish v. Gibbs*, 3 Johns. Ch. 523, it was held that she might execute in favor of her husband a power over realty reserved to her while sole. At common law, a *feme covert* could not affect realty except by a fine and recovery in which she was examined apart from her husband. But by that means she might declare the uses to which the estate should be held, and might declare that the trustee should hold to such uses as she might appoint, and in such a case her future disposition would be as effectual against her heirs as her immediate disposition would have been: *Dillon v. Grace*, 2 Sch. & Lef. 463; *West v. West*, 10 Serg. & R. 445. It is often provided by statute that a married woman may by joining her husband in a conveyance which she acknowledges apart from her husband, and which is enrolled, make a valid conveyance of real property. These statutes accomplish what was formerly the office of the fine and recovery: *Crofts v. Middleton*, 2 Kay & J. 194; *Pride v. Bubb*, L. R., 2 Ch. Ap., 64; S. C., 7 Ch. Ap. 64; *West v. West*, 10 Serg. & R. 445. But an omission of the acknowledgment will be fatal: *Id.* An exception to the general incapacity of a *feme covert* to will realty is made in *Wayner v. Ellis*, 7 Pa. St. 411; S. C., 47 Am. Dec. 515, where it is held that the husband may, by consent, give validity to his wife's will of realty if he is her sole heir.

The rule held in the above cases prevailed in England until 1865, when the former doctrine was overruled, and it was held that a devise of real estate to trustees upon a trust for the sole and separate use of a married woman and her heirs, though it contained no express power of disposition, gave her the same power of disposition over the equitable fee as if she were a *feme sole*. Likewise where the estate is devised to her directly without the interposition of trustees. These cases are decided upon the same ground as those cases which allow the *feme covert* to dispose of her separate personal estate, namely, that the power of alienation is a necessary incident to the separate use of property: *Taylor v. Meads*, 11 Jur., N. S., 166; *Hall v. Waterhouse*, *Id.* 361. See *Pride v. Bubb*, L. R., 7 Ch. Ap., 64. Upon the opinion of Lord Chancellor Westbury, in *Taylor v. Meads*, delivered in 1865, Mr. Bishop characteristically remarks: "One can not read his luminous works

without thankfulness to that Providence which guides our earthly affairs, for making now and then for high judicial place a man who will not permit his intellect to wear the chains which superstition, clothed in judicial garments, puts upon almost every mean understanding caught within what ought to be the enlightened ranks of the law:" 1 Bish. Mar. W., sec. 853.

WIFE OF ALIEN OR OF ONE CIVILITER MORITUUS MAY MAKE WILL.
 A married woman is a *feme sole* as to property acquired after her husband has been convicted of felony, and she may dispose of such property by will in the same manner and with like effect as a *feme sole*: *In re Martin*, 2 Rob. Ecc. 405; *Coward*, *In Goods of*, 4 Sw. & Tr. 46; 1 Jarm. on Wills, 35, note. See Co. Lit. 133 a. So if the husband is attainted and pardoned on condition of transportation; *Newsome v. Bowyer*, 3 P. Wms. 37. So where the husband is banished for life: *Countess of Portland v. Prodgers*, 2 Vern. 104. The husband being an alien, the wife is chargeable as a *feme sole*, and presumably may likewise make a will: *Deerly v. Mazarine*, 1 Salk. 116.

WIFE MAY DISPOSE BY WILL OF PROPERTY HELD IN AUTRE DROIT.
 A further exception obtains to a married woman's general incapacity to make a will at common law. She may bequeath property held *in autre droit* as an executrix or trustee, as the duties of the trust may require, without her husband's consent. She may appoint, as executrix of another person, a succeeding executor: *Scammell v. Wilkinson*, 2 East, 552; *Hodesden v. Lloyd*, 2 Bro. C. C. 534, 543; *Tucker v. Inman*, 4 Man. & G. 1076; *Stephens v. Bagwell*, 15 Ves. 137; *Martin, In Goods of*, 3 Sw. & Tr. 1; 8 Jur., N. S., 1134; 1 Williams on Ex. 53, 414.

ANTENUPTIAL WILL, REVOKED BY MARRIAGE.—As it is essential to a will that it should be ambulatory until the testator's decease, the marriage of a *feme sole* who has made a will necessarily revokes it, for she becomes then in general incapacitated to make a valid will. And survivorship of the wife will not validate her antenuptial will, but she must republish it to render it effective: *Doe v. Staple*, 2 T. R. 695; *Hodesden v. Lloyd*, 2 Bro. C. C. 544; *Forse v. Himbling*, 4 Rep. 61; *Long v. Aldred*, 3 Add. 48; *Osgood v. Breed*, 12 Mass. 525, 530; *Garrett v. Dabney*, 27 Miss. 335; *Lathrop v. Dunlop*, 4 Hun, 213; *Sanders v. Simcich*, 1 West Coast Rep. 868; contra: *Wood v. Bullock*, 3 Hawks, 298.

A clear and distinct recognition of the existence and validity of the will at the time of the execution of a codicil for that purpose is a sufficient revival of a will revoked by marriage without re-execution of whole will: *Brown v. Clark*, 16 Hun, 559.

A widow having, after the death of her husband, delivered a will made during coverture to her executor for safe custody, such delivery, coupled with other acts of recognition, amounts, in a court of probate, to a republication of the will: *Miller & Ross v. Brown*, 2 Hagg. Ecc. 209.

A parol republication of an antenuptial will is not sufficient: *Transen's Will*, 26 Pa. St. 202. The husband's consent to the probate of an antenuptial will does not validate it: *In re Carey*, 49 Vt. 236; S. C., 24 Am. Rep. 133. An authority to will certain property during coverture executed before the marriage is void, and no execution of the power, although the disposition was in favor of the husband and the marriage takes place almost immediately: *Hodesden v. Lloyd*, 2 Bro. C. C. 534; *Doe v. Staple*, 2 T. R. 695. But if the antenuptial will be of property which she could dispose of in this way after marriage, the marriage will not revoke it: *Webb v. Jones*, 36 N. J. Eq. 163. So where the property willed is such that the husband acquires no marital rights in it: *Morton v. Onion*, 45 Vt. 145.

PROBATE OF MARRIED WOMAN'S WILL, EFFECT OF.—The probate court, in probating the will, decides merely upon the due execution of the will: not upon the testamentary right of disposal, under a power, for example, not upon whether the power has been duly executed, and not upon what passes by the will: *Michael v. Baker*, 12 Md. 158; *Holman v. Perry*, 4 Met. 492, 498; *Waters v. Cullen*, 2 Bradf. 354; *Schull v. Murray*, 32 Md. 9; *Leigh v. Smith*, 3 Ired. Eq. 442; *Brook v. Turner*, 1 Mod. 211; S. C., 2 Id. 170; *Jenkin v. Whitehouse*, 1 Barr. 431. If *prima facie* she is shown to have a power, the court of probate can not inquire whether it has been properly exercised upon the will being offered for probate, but when an averment is made that the testamentary paper was made in pursuance of a power which is before the court, the court is bound to grant probate, and thereby leave it to the competent court of construction to decide whether the paper is a due execution of the power: *Chatelain v. De Pontigny*, 1 Sw. & Tr. 411; *Kelly v. Kelly*, 5 B. Mon. 369; *Michael v. Baker*, 12 Md. 158. Under these cases the judgment of the probate court is conclusive only upon the fact of the due execution of the instrument and the fact that the decedent was of sound and disposing mind and memory; and not upon her capacity as a married woman to dispose by will of the property covered by the instrument. Where, however, the jurisdiction of the probate court is competent to include the latter question, its decision upon it will be conclusive. For upon matters within its jurisdiction the judgment of a probate court is as conclusive as the judgment of any other court. If, then, the capacity and power of a married woman to make a will is within the probate jurisdiction, the judgment of the probate court upon that question will be conclusive upon the heirs at law and other interested parties until it is vacated or reversed by a direct proceeding for that purpose: *Parker v. Parker*, 11 Cush. 519; *Judson v. Lake*, 3 Day, 318; *Cassels v. Vernon*, 5 Mason, 332; *Allison v. Smith*, 16 Mich. 421; see *Tucker v. Inman*, 4 Man. & G. 1049, 1076.

A will upon its face purporting to dispose of real property may be proved so far as it relates to choses in action if it appear that she had no realty: *Reed v. Blaiedell*, 16 N. H. 194; S. C., 41 Am. Dec. 722.

STATUTES AFFECTING POWER OF MARRIED WOMEN TO MAKE WILLS.—A statute with a provision resembling that of the first statute of wills, 32 Hen. VIII., giving the power to devise to any one seised of real estate, of twenty-one years of age, and of sane mind, does not include within its terms married women: *Osgood v. Breed*, 12 Mass. 530; *Morse v. Thompson*, 4 Cush. 563; *Wakefield v. Phelps*, 37 N. H. 295; *Marston v. Norton*, 5 Id. 205. The tendency now, however, is very strong toward removing all disability from married women respecting their power of willing their property, whether it be real or personal. Many states have removed the disability *in toto*, while others have given them much greater power over their property than they had at common law: 1 Redf. on Wills, 22. She may dispose by will of her property like a *feme sole*, or nearly so, in Alabama, Arkansas, California, Colorado, District of Columbia, Connecticut, Florida, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, Ohio, Rhode Island, South Carolina, Vermont, and Wisconsin. In some states her statutory power is restricted so far as it may affect the rights of the husband in the property, such as curtesy. This is the case in Massachusetts, Missouri, New Hampshire, New Jersey, and Rhode Island. Some statutes provide that she may not dispose of more than half of her estate without her husband's consent. Such is the case in Colorado, Kansas, and Massachusetts. And the statutes of other states simply enact the common

law, allowing a married women to dispose of her separate estate without her husband's consent, to execute a power of appointment without her husband's consent, or generally with her husband's consent to dispose of personalty; and some go further and allow her to make a will of any property with his consent. In these statutes a provision is sometimes made that the consent shall be in writing and indorsed upon the instrument. Such statutes exist in Delaware, Georgia, Kentucky, Maryland, Minnesota, Nebraska, New Hampshire, North Carolina, Oregon, Pennsylvania, Tennessee, and Virginia. In England the married woman's property act of 1882 gives the married woman full power of acquiring, holding, and disposing, by will or otherwise, of any real or personal property, in the same manner as if she were a *feme sole*, and without the intervention of any trustee: See note on this statute, 27 Am. Law Rev. 555, 559. In 3 Jarm. on Wills, Am. ed. 1881, 752, note, the enabling statutes of the several states are collected. In *Campbell v. Brooder*, 7 Lea, 240, it is held that a married woman under twenty-one years of age can not dispose of property by will, although the statute conferring the power upon her does not in express words limit the age. The age at which she may make the will is generally provided by statute. But the Texas and Iowa statutes give the power to make a will to all persons, irrespective of age, "who may be or may have been lawfully married."

In 1849 a married woman received, by a New York statute, a general power to make wills. Before this, under the act of 1848, she had no right of testamentary disposition. It was held that during the *interim* between these statutes a married woman could not will her property, although her disposition would have been valid in equity, being a will of her separate personal estate, pursuant to an antenuptial contract: *American Home M. Soc. v. Wadham*, 12 N. Y. 415, reversing S. C., 10 Barb. 597. A provision that the trustee of the married woman's property shall join in a deed if it has no reference to a devise: *Smith v. Thompson*, 2 McArthur, 291; S. C., 29 Am. Rep. 621.

ASSENT UNDER ENABLING STATUTES.—All the husband's rights, such as courtesy and the like, which had been reserved to him by the statute of New Jersey, 1864, he may and does waive by his assent to his wife's will; and this assent is conclusive as to himself and his creditors: *Beale v. Storm*, 28 N. J. Eq. 372. The same principle is applied in Massachusetts: *Sibley v. Bullock*, 10 Allen, 94. A statute provided that the will of real and personal property be valid if the "husband" consent. It was held that the consent must be given during her life-time, for he could not consent in accordance with the statute after her death, being then no longer her husband: *Smith v. Sweet*, 1 Cush. 470. A statute of Iowa provides that a husband's or wife's share in the other's estate can not be divested by will except by a consent thereto recorded within six months. Under this provision it was held that a valid record of such a consent could not be made after the statutory time had elapsed, for it would render the settlement of estates too uncertain if the rule were otherwise: *Houston v. Lane*, 17 N. W. Rep. 514. The Georgia code, sec. 2410, provides that a married woman may dispose of property by will, "when, having a separate estate absolutely or an estate in expectancy, her husband consents to her disposing of the same by will." And it was held that the consent in the statute referred only to the estate in expectancy, and was necessary only in the disposition of such an estate: *Cavanaugh v. Ainchbacker*, 36 Ga. 500, 506. A will made before the enabling statute, but devising the same amount of property to the heir at law as he would take if intentionally omitted from the will, is valid without the husband's consent: *Burrough v. Nutting*, 105 Mass. 228.

REVOCATION BY MARRIAGE UNDER ENABLING STATUTES.—In Virginia, by statute, a subsequent marriage is a revocation of the will unless it be made “in pursuance of a power of appointment, when the estate appointed would not in default of such appointment pass to his or her [the testator’s] heir, personal representative, or next of kin.” *Pharp v. Wooldridge*, 14 Gratt. 332. The provision of the New York revised statutes, that a subsequent marriage revokes a prior will, is not repealed by the enabling acts of 1848, 1849, and 1860: *Loomis v. Loomis*, 51 Barb. 257. But when a woman is allowed to dispose of her property like a *feme sole*, the common-law rule making a subsequent marriage a revocation of her will made when sole will no longer prevail. *Cessat ratio, cessat ipsa lex: In re Tuller*, 7 Ill. 99. In Massachusetts, by the revocation of the statute of William, marriage without issue continued no longer a revocation of an antenuptial will.

CASES CONSTRUING STATUTES.—The following cases, construing the statutes of the several states in which they are decided, hold, that under those statutes a married woman has more or less the power of a *feme sole* in the disposition of her property by will: *Urquhart v. Oliver*, 56 Ga. 344; *In re Tuller*, 79 Ill. 99; *Noble v. Enos*, 19 Ind. 72; *Buchanan v. Turner*, 26 Md. 1; *Schull v. Murray*, 32 Id. 9; *Vreeland v. Ryno*, 26 N. J. Eq. 160; *Wakefield v. Phelps*, 37 N. H. 295; *Van West v. Benedict*, 1 Bradf. 114; *Waters v. Cullen*, 2 Id. 354; *Wallace v. Bassett*, 41 Barb. 92; *Allen v. State*, 5 Ohio, 65; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Johnson v. Sharp*, 4 Coldw. 45; *In re Carey*, 49 Vt. 236; S. C., 24 Am. Rep. 133; *Smith v. Thompson*, 2 McArthur, 291; S. C., 29 Am. Rep. 621. See 20 Alb. L. J. 244, 264.

Under a statute giving the *feme covert* full power of disposition, except that she is not authorized to dispose of any interest to which her husband was or would be at her death entitled, it was held that he might reduce choses in action to possession after her death, as her administrator, and hold them though they were disposed of by her will: *Vreeland v. Ryno*, 26 N. J. Eq. 160.

THE PRINCIPAL CASE IS CITED in *Allison v. Smith*, 16 Mich. 421, to the point that upon the probate of a married woman’s will, the question of her right to make a will in the particular instance in question is a proper subject for inquiry and decision; and in *Wakefield v. Phelps*, 37 Id. 299, to the point that a married woman could not, at common law, devise real estate, and could in no case make what is properly called a will.

EDGERLY v. SHAW.

[25 NEW HAMPSHIRE, 514.]

EXECUTORY CONTRACT OF INFANT MAY BE RATIFIED BY EXPRESS PROMISE or by such acts as evince an intention to be bound by it; but a mere acknowledgment is not enough.

EXECUTORY CONTRACT OF INFANT IS INVALID UNTIL RATIFIED; executed contract of infant is binding until avoided.

EXPRESS PROMISE TO PAY DEBT OR PERFORM AGREEMENT contracted during minority may be either absolute or partial, qualified or conditional.

PARTIAL, QUALIFIED, OR CONDITIONAL PROMISE TO PAY CONTRACT entered into in infancy is a new promise founded upon the original consideration, and not a ratification of the old one, and it must be declared upon as a new promise.

CONDITIONAL PROMISE TO PAY OR PERFORM CONTRACT MADE UNDER AGE
can not be enforced until the happening of the contingency, or the performance of the condition, but then the new contract becomes absolute and the original contract is ratified, and the plaintiff may declare upon either.

PROMISE MADE AFTER MAJORITY BY MAKER OF PROMISSORY NOTE EXECUTED IN INFANCY to pay it at the end of a specified time in labor or else in money is a conditional promise, and becomes absolute upon the expiration of the specified time whereby the original contract is confirmed and the promisor made liable to suit on either contract.

PROMISSORY NOTE MADE BY INFANT IS NEGOTIABLE AFTER CONFIRMATION, and an action thereon will lie in the name of the indorsee.

PAYEE OF PROMISSORY NOTE INDORSING IT WITHOUT RE COURSE IS COMPETENT WITNESS for the indorsee in an action against the maker.

Assump~~s~~ by the indorsee of a promissory note against the maker who executed it during infancy, payable to John Barker or order, who indorsed it to the plaintiff without recourse. Barker was called upon to testify to a new promise to pay the note made by the defendant after he came of age. It was objected by the defendant that this witness was incompetent on the ground of interest. The objection was overruled. Barker testified that while he held the note, he informed the defendant, who was a joiner, that he was intending to have some work done, and requested payment of the note in labor. The defendant replied that at present he was bound by other engagements, but that at the end of six weeks he would come and work for Barker at the rate of a dollar a day and pay him in this way, or else he would pay him in money. The defendant never performed any labor for Barker. The defendant objected that this promise did not furnish the plaintiff with a cause of action. The plaintiff took a verdict subject to the opinion of this court upon the defendant's exception.

N. and G. N. Eastman, for the plaintiff.

Christie and Kingman, for the defendant.

By Court, GILCHRIST, C. J. The executory contract of an infant may be ratified or confirmed by an express promise, or by such acts as evince an intention to be bound by it: *Hoit v. Underhill*, 9 N. H. 436 [32 Am. Dec. 380]; *Aldrich v. Grimes*, 10 Id. 194. But a mere acknowledgment is not enough: *Hale v. Gerrish*, 8 Id. 376; *Millard v. Hewlett*, 19 Wend. 301; *Thompson v. Lay*, 4 Pick. 48 [16 Am. Dec. 325]. The case of a promissory note rests on the same ground as other executory contracts. It is not void, because it may be confirmed; but it

is invalid, that is, without binding force, until it is confirmed: *Merriam v. Wilkins*, 6 N. H. 432 [25 Am. Dec. 472]; *Conn v. Coburn*, 7 Id. 368 [26 Am. Dec. 746]; *Aldrich v. Grimes, supra*; *Reed v. Batchelder*, 1 Met. 559. The executory contracts of an infant are said to be voidable, but this word is used in a sense entirely different from that in which it is applied to the executed contracts of an infant. In the latter case, the contract is binding until it is avoided by some act indicating that the party refuses longer to be bound by it. In the former case, it is meant merely that the contract is capable of being confirmed or avoided, though it is invalid until it has been ratified.

In the present case, the proof relied on to show a ratification is of an express promise. It is, therefore, unnecessary to refer to any of the other modes of ratification which are discussed in the books. An express promise to pay a debt or perform an agreement, contracted or entered into during minority, may be partial, qualified, or conditional. And the effect of such promises as a ratification of a previous agreement is by no means the same.

As to the absolute promise, no question can arise. The partial promise, or the promise to pay or perform a part of the original debt or agreement, is binding only to the extent of the new promise, and is not a ratification of the original debt, but a new and distinct promise, though founded upon the original consideration.

A new promise may be qualified in various ways. It may bind the promisor to pay the debt at a different time or place from those originally stipulated. It may be a promise to pay, not in money, but in specific articles, or in personal services. These cases can not be distinguished, in principle, from that last stated. They are new contracts, not ratifications of the old ones.

When a contract which requires confirmation is confirmed, it takes effect from its date, or from the time of making it. But this can not be the case as to an agreement which contains new stipulations not comprised in the original agreement. Among the many advantages of an observance of the rules of pleading is to be remarked the precision with which they indicate the exact point in controversy. And in whatever form the question may arise, we can see at once the material points involved, by supposing the questions to be raised by the pleadings. When infancy is pleaded to a declaration upon a contract, the replication, if the plaintiff would avail himself of a ratification or

new promise, that the defendant, after the making of the said promises in the declaration mentioned, and before the commencement of the suit, to wit, on, etc., attained his age of twenty-one years, and after he had so attained, etc., and before the commencement of the suit, to wit, on, etc., assented to and then and there ratified and confirmed the said promises in the declaration mentioned, etc.: 2 Ch. Pl. 595; Story's Eq. Pl. 150. The rejoinder is, that the defendant did not, after he attained the age of twenty-one years, and before the commencement of the suit, assent to, ratify, and confirm the said promises in the declaration mentioned, or either of them, in manner and form, etc.: 2 Ch. Pl. 659; Story's Eq. Pl. 150. Upon these pleadings it is apparent that the point to be tried and determined is merely whether the defendant confirmed the promises declared on. Evidence that he made any other or different agreement would not support the rejoinder, any more than it would support the original declaration. In such cases it is clear that the new contract is valid, and it has never been denied that the original consideration is sufficient to support it; but being a new and different contract, it must be stated and declared on according to the facts and the evidence to sustain it.

Within the class of qualified promises in renewal of contracts entered into by an infant are the cases of new promises, to be performed upon a condition or a contingency. They are distinguishable from other cases of qualified promises by the nature of the qualification. So long as the contingency remains, or the condition is unperformed, they are qualified contracts, governed by the same rules as the class last referred to. They may be declared upon and an action maintained upon them, but the contract offered in evidence is not that originally made. It differs from it in substantial particulars. If the plaintiff declare upon the original cause of action and allege a confirmation of the original contract, he will fail, because his proof will show a new and distinct contract, and not an affirmation of the old one. The evidence would, in fact, prove a refusal to ratify the original agreement. If the defendant promise to pay in goods, it will be equivalent to saying, "I will not pay you in money, but I will pay you in goods," thus proposing to substitute a new contract for the old one. If he should say, "I will pay you in three years," or "when I am able," he will, in substance, decline to pay when the plaintiff requests it.

If a new promise be made to pay or perform a contract made under age, upon a contingency or a condition, no action will

lie until the happening of the contingency or the performance of the condition, for the old contract will not until that time have been confirmed, and the new agreement is distinct from it; and of that, in the case supposed, there will then have been no breach. When the contingency has happened, or the condition is fulfilled, the new contract becomes absolute, the original contract is ratified, and the plaintiff may declare upon it, or upon the new agreement. If he declare upon the original contract, and infancy be pleaded, he may reply a confirmation, and upon proper evidence he will be entitled to recover. Or he may declare upon the new promise, and set it forth with the necessary averments; and upon sufficient proof will be entitled to recover in that case.

In the case of *Whitney v. Dutch*, 14 Mass. 457 [7 Am. Dec. 229], an infant made a promissory note, and when he became of age, being applied to for payment, acknowledged that it was due, and promised that on his return to E., where he resided, he would endeavor to procure the money and send it to the plaintiffs. It was held that this was competent evidence of a ratification. The action was upon the note. The defendant pleaded infancy, and the plaintiff replied a confirmation of the original promise. Parker, C. J., said: "The terms of ratification need not be such as to import a direct promise to pay. All that is necessary is that he expressly agrees to ratify his contract, not by doubtful act, such as payment of a part of the money due, or the interest, but by words, oral or in writing, which import a recognition and a confirmation of his promise." In the case of *Everson v. Carpenter*, 17 Wend. 419, it was held that if a promise by an infant to pay his note be conditional, performance or the happening of the condition must be shown to sustain an action. In *Thompson v. Lay*, 4 Pick. 48 [16 Am. Dec. 325], Parker, C. J., states the law thus: "A ratification may be absolute or conditional. If it be the latter, the terms of the condition must have happened or been complied with before an action can be sustained. I ratify and confirm my promise, provided I receive a certain legacy, or if I succeed to a certain estate, or if I recover a certain sum of money, or if I draw a prize in a certain lottery, would make a conditional promise or ratification sufficient to make the defendant liable on a contract made when a minor, when the events happen, but not before."

In the case before us, the defendant, on being asked by the plaintiff to pay, said that at the end of six weeks he would come

and work for him, at a dollar a day, or else he would pay him the money. This was a qualified promise to pay, depending on a contingency. For the period of six weeks the defendant reserved to himself the right to pay in labor, at a dollar a day. During that time it was contingent whether his promise to pay the money would become binding, and until the expiration of that period it was uncertain whether the original contract would be confirmed, or the alternative promise would be performed. Until the end of six weeks no action could be brought, either upon the old or the new contract; but after the six weeks had elapsed, after the right reserved by the defendant to pay in labor had ceased, the new promise to pay in money became absolute, and the old contract was absolutely confirmed, and the defendant was then liable to be sued upon either contract. It does not appear whether the action was brought before or after the expiration of the six weeks. We take it for granted, however, that it was brought after that time.

The effect of the new promise, after it became absolute, being to ratify and confirm the note, and to give it the same validity as if the promisor had been of legal capacity to make the note at the time of its date, it was from that time at least a good negotiable note, transferable according to its terms, and the action may well be brought in the name of the indorsee: *Reed v. Batchelder*, 1 Met. 559. If an action had been brought upon the new promise, it must have been in the name of Barker, because that contract is not negotiable.

We see no objection to the competency of Barker as a witness. Having indorsed the note "without recourse," he was not responsible in any way to the plaintiff, and stands as if he had been released by him: *Cowles v. Harts*, 3 Conn. 516; *Howe v. Thompson*, 11 Me. 152; *Watson v. McLaren*, 19 Wend. 558.

Judgment on the verdict.

PROMISE TO PAY CERTAIN SUM OF MONEY ON GIVEN DAY, with privilege of discharging the debt in some other commodity, becomes an absolute promise to pay money if the other commodity is not paid on that day: *Baker v. Todd* 55 Am. Dec. 775, and cases cited in the note.

PROMISE BY MAKER AFTER MAJORITY TO PAY PROMISSORY NOTE MADE IN INFANCY removes the bar to recovery: See *Tibbets v. Gerrish*, ante, p. 307, and note-citing prior cases. Declarations of intention to pay made to a third person are not sufficient, but otherwise if made to an undisclosed agent: *Hoit v. Underhill*, 32 Am. Dec. 380; S. C., 34 Id. 148, and cases cited in notes, as to what amounts to a ratification of an infant's contract. The principal case is cited in *Fetrow v. Wiseman*, 40 Ind. 152, to the point that all contracts of an infant, not in themselves illegal, being capable of ratification by him when

an adult, are voidable only; and the distinction that those are voidable which may be for his benefit while those that could do him no good are void is obsolete.

INTEREST TO DISQUALIFY WITNESS, NATURE OF: See *Cochran & Estill v. Cunningham*, 50 Am. Dec. 186, and note citing prior cases; *Masters v. Farmer's Ex're*, Id. 114, and note. Maker of a note may be a competent witness if released from liability thereon: *Bank v. Fordyce*, 49 Id. 581.

LADD v. BAKER AND TRUSTEE.

[26 NEW HAMPSHIRE, 76.]

PROMISSORY NOTE IN FORM, "I PROMISE TO PAY," etc., and signed by two persons, is a joint and several note."

ONE OF TWO OR MORE JOINT OR JOINT AND SEVERAL DEBTORS CAN NOT BE CHARGED as a trustee unless the others are joined with him in the process, as a general rule.

ONE OR TWO OR MORE JOINT OR JOINT AND SEVERAL DEBTORS MAY BE CHARGED as trustee on a trustee process against him severally when it appears that he will not remain liable to pay the debt or any part of it a second time.

ONE OR MAKERS OF PROMISSORY NOTE MAY BE CHARGED AS TRUSTEE on process against him separately, when one of the plaintiffs is the other maker and signed as surety.

FOREIGN attachment. Gordon was sought to be charged as trustee of Baker, the defendant, by Ladd and Calley, the plaintiffs. Gordon made a promissory note to Baker in connection with the plaintiff Ladd, who signed as surety, although it did not so appear upon the note. The case is otherwise sufficiently stated in the opinion.

W. C. Thompson, for the plaintiffs.

Leverett, for the trustee.

By Court, Woods, J. Gordon, the trustee, is sought to be charged for the amount of a promissory note. It was in form as follows, namely: "I promise to pay David B. Baker," etc., and was signed by Gordon, and by Jesse Ladd, one of the plaintiffs. The note then was a joint and several promissory note. It was the note of both and of each of the subscribers, as to its legal obligation between the parties to it: *March v. Ward*, Peak. N. P. C. 130; *Hemmenway v. Stone*, 7 Mass. 58 [5 Am. Dec. 27]; *Humphreys v. Guillow*, 13 N. H. 385 [38 Am. Dec. 499]. An action might be maintained upon the note in favor of Baker, the payee, against Gordon alone, or against Gordon and Ladd jointly, at his election. Can Gordon be charged for the

note as trustee by a creditor of Baker, without joining his co-promisor in the action? That is the question arising upon this case. In *Rix v. Elliot*, 1 Id. 184, the only question was whether Elliot could be adjudged the trustee of Noyes, the principal debtor, he being indebted jointly and severally with one Sawyer to said Noyes, and being alone sued as trustee. On behalf of the trustee, it was objected that Sawyer should have been joined in the process. It was then said by the court that "it has often been decided in this state that where there are several joint debtors they must all be joined in the process." And the trustee was discharged. In *Hudson v. Hunt*, 5 Id. 538, it was decided that, as a general rule, one of two joint debtors can not be charged as a trustee unless the other debtor is joined with him in the process. No authorities are cited in support of the rule thus stated. It seems to have been understood as the settled law in this state. The debt on account of which the trustee was attempted to be charged in that case was not in fact a joint and several debt, but a joint debt only, for which he was jointly liable with another debtor.

Jewett v. Bacon, 6 Mass. 60, was a *scire facias* against the trustee to charge him for the amount of two joint and several notes of hand, signed by the trustee and one Richardson, who signed as his surety, each note being for a certain quantity of hay, and payable to Maxwell at different periods specified therein. During the pendency of the original action, Richardson paid and satisfied the note which first fell due, at its maturity. Upon that ground, it was insisted that the contract was determined, both as to the trustee and as to Richardson. The court say: "This argument appears to have weight; Richardson, not a party or privy to the suit, can not be affected by any judgment that can be given. As a several as well as a joint promisor, he might legally discharge the contract at his pleasure, without or even against the assent of the defendant. And if he discharged it when liable to be called upon to fulfill it, he is entitled to an indemnity against the defendant, for whom he was a surety. The law, therefore, will not require the defendant to pay the value of the merchandise to a creditor of the promisee, and at the same time leave him liable to indemnify his surety for satisfying the promisor. When, therefore, a debtor holds a joint contract against two or more, and his creditor would avail himself of the benefit of this contract, under this special attachment, he must summon all the parties liable by law to discharge it."

In *Atkins v. Prescott*, 10 N. H. 120, the doctrine of the cases of *Rix v. Elliot* and *Hudson v. Hunt, supra*, is restated, namely: "One of two joint debtors can not be charged as a trustee in a suit where the other debtor is not joined." The point raised and decided in that case was, that where a person is summoned in his individual capacity, and it appears that he is liable to the principal only as a member of a firm, he is not chargeable in the process of foreign attachment. From the authorities cited, it would seem that the same rule is applicable in the case of a joint and several contract as in the case of a joint contract. The protection to be furnished in either case to the trustee is the same. There is the same necessity for the application of the rule in the one case as in the other. The foundation and the decisions establishing the rule is the liability of the joint or joint and several promisor who is summoned as trustee, to pay the joint debt or some portion of it a second time.

Ordinarily, the debtor who is not made a party to the action has a right, and may pay and discharge the contract at its maturity, and gain a right to a contribution against the party sued. In the case of *Jewett v. Bacon, supra*, it was held that he might make the payment and discharge the contract during the pendency of the suit, without, and even against, the will of the trustee. If such be the law, and the trustee in such a case was holden to be chargeable, it is clear that he might be greatly prejudiced by reason of his liability to pay the debt a second time, under the trustee process. It is this risk of prejudice and injury to the trustee that has led to the adoption of the rule already stated. While the statute is intended to furnish to creditors the means of satisfying their debts by the attachment of the funds of debtors in the hands of trustees, it is not designed to give the trustee process the effect of working injustice and prejudice to the trustee. The law does not intend changing his rights and duties to his detriment, but only, without injury to him, to apply the funds of the principal debtor found in his hands to the fair discharge of the creditor's claim. This statute is properly to be so construed and administered as to accomplish its just purposes and none other.

A trustee, therefore, who is summoned, and who comes into court and makes a full disclosure of the facts in the case, will not be held chargeable, unless in a case and under circumstances effectually protecting him against all danger of further legal liability for the payment of the debt, or the discharge of the duty for which he may be held liable. Such are clearly the

grounds, reasons, and views upon which the well-settled rule in regard to the liability of joint and joint and several debtors has been arrived at.

If the same reasons are found to exist in the present case upon which the decisions already made and referred to are seen to rest, then the trustee, although he may be justly indebted to the principal debtor, and even liable to pay the entire debt to him, must be discharged. But if those reasons do not exist in this case, then a different rule may be applied, and a different result may be arrived at, and the trustee, having funds in his hands belonging to the principal debtor, may be charged therefor. For when the reasons no longer exist upon which a rule of law rests, the rule itself ceases to exist.

Gordon, the trustee, is the principal signer of the note for which the plaintiff claims to charge him in this suit, and it is his duty to pay the whole debt and save Ladd, the other signer, harmless, and if he can be held to pay it to Ladd and Calley, without the risk of further liability, we entertain no doubt that he should be charged.

Ladd, who signed the note with the trustee, and as his surety, is one of the plaintiffs, and with the other plaintiff seeks to charge Gordon, as the trustee of Baker, the principal debtor, with the amount of the note. Ladd, then, knows the state of the claim and the condition of the parties to the action. He is himself a party, and as such chargeable with that knowledge. And we think it can not be doubted that if, while prosecuting this suit, Ladd should pay the debt to Baker, and at the same time should proceed and charge the trustee in the present action, he would be wholly remediless as against Gordon for such payment. It could not be regarded as a payment at the request and for the benefit of Gordon, by his surety. It would be a payment by him in his own wrong. If he could be permitted to pay the debt to Baker and seek his redress against the trustee for such payment, and at the same time be allowed to charge the trustee with the payment of the note to himself and his co-plaintiff in this process, the law would be chargeable with affording its aid to enable the party, with a full knowledge of the wrong, and by his own acts, to cast upon the trustee the burden of paying the note twice. But there is no principle of law more firmly established than that which forbids a party to take advantage of his own wrong. And we think it entirely clear that such a payment could not create a liability on the part of the principal in the note to refund the money so paid to the

surety making the payment. And if the trustee be charged in this case, and shall pay the amount of the judgment, he will be wholly discharged from his liability to Baker, the principal defendant, without incurring the risk of any liability to Ladd, the other co-signer of the note, by reason of any act of his, or any payment which he may make upon the note to any one. The reason, then, upon which the general rule of law before stated would seem to rest fails in this case altogether.

Upon the whole, we are all clearly of opinion that the trustee is chargeable, and that this result should be certified to the court of common pleas.

Trustee chargeable.

NOTE SUBSCRIBED BY TWO, BUT READING "I PROMISE TO PAY," ETC., IS THEIR JOINT AND SEVERAL NOTE: *Hemmenway v. Stone*, 5 Am. Dec. 27.

MERRILL v. HARRIS.

[26 NEW HAMPSHIRE, 142.]

DECISIONS OF PROBATE JUDGE, REGULARLY MADE, OF MATTERS WITHIN HIS JURISDICTION, are conclusive, unless an appeal is interposed.

PROCEEDINGS OF PROBATE COURT MUST BE REGULAR, AND UPON MATTERS WITHIN ITS JURISDICTION, OR THEY WILL NOT BE CONCLUSIVE.

LICENSE BY PROBATE COURT TO ADMINISTRATOR TO SELL REAL ESTATE need not fix the sum of money to be raised at the sale, if, although the property is more than sufficient to pay the demands, it is so situated that a part of it can not be sold without injury to the persons interested therein, under the New Hampshire statute; notwithstanding another provision of the same statute that the probate judge, in a license to sell the decedent's real estate, shall fix the sum of money to be raised at the sale.

DIFFERENT SECTIONS OF SAME ACT MUST, IF POSSIBLE, BE SO CONSTRUED AS TO BE CONSISTENT WITH EACH OTHER.

SUFFICIENCY OF EVIDENCE OF DEBT TO WARRANT ISSUANCE OF LICENSE to sell decedent's realty is a matter within the jurisdiction and discretion of the probate judge, the petition being in due form, and regular and legal notice having been given to the heirs and all concerned; and his decision thereupon can not be inquired into collaterally.

ALL CLAIMS MUST BE LIQUIDATED BY EITHER CONFESSION OR JUDGMENT before they can be recovered by suit on a probate bond of an administrator or executor.

Covenants made by administrator with purchasers of decedent's property are personal, and do not subject to liability sureties on his bond.

SURETY ON ADMINISTRATOR'S BOND IS NOT INCOMPETENT AS WITNESS FOR ADMINISTRATOR because of a breach of a covenant in the administrator's deed of the decedent's realty.

Writ of entry. The defendant claimed under a deed from the administratrix of Susannah Fogg. He introduced, among other evidence, a petition for a license to sell real estate, dated in 1850, and stating that the personality of the decedent was not sufficient to pay the decedent's debts. The license of the probate judge was also introduced, which read as follows: "Upon examining the foregoing petition and order of notice thereon, it appears that said order has been complied with, and that the facts alleged in said petition are true. It is therefore decreed that the prayer of said petition be granted, and that the said petitioner have license to sell the whole of the real estate of the said deceased in said petition described." The application of the administratrix for the allowance of her private claim, filed in 1851, amounting to more than the value of the decedent's personality, and the report of referees appointed to adjudicate the claim, reciting that the claim was contested by Robert Harris, an heir of the estate, and allowing the claim in full, were introduced, as was also a decree of the probate judge accepting the report at a court held at Plymouth that should by law have been held that day at Bristol. There was also parol evidence showing that the deceased was indebted to the administratrix in the amount claimed. During the trial a surety upon the administration bond was allowed to testify against the objection of the defendant. In the administratrix's deed of the land in question, the administratrix covenanted for her capacity to convey, the regularity of her proceedings, and for warranty. Verdict for the defendant, and motion by the defendant to set it aside, and for a new trial. The case is otherwise sufficiently stated in the opinion.

W. C. Thompson, Burrows, and Bellows, for the defendant.

Sargent and E. A. Hibbard, for the defendant.

By Court, EASTMAN, J. It is contended on the part of the defendant that the nonsuit moved for upon the trial should have been granted; and for the reason that the license which was granted by the probate court, and which laid the foundation of the plaintiff's title, was illegally issued.

But such is not the conclusion to which we have arrived. The decisions of a judge of probate, regularly made, of matters within his jurisdiction, are, unless an appeal is interposed, conclusive against all the world: *Bryant v. Allen*, 6 N. H. 116, and numerous authorities there cited. This doctrine has been

frequently recognized in this court, whenever the question has arisen.

The proceedings of the probate court, however, must be regular and upon matters within the jurisdiction of the judge to determine, otherwise they will not be conclusive. Thus it has been held that upon an application by the administrator of an intestate estate for license to sell real estate for the payment of debts, there must be an order of notice; and if such license is granted without notice to the heirs, a sale under it will pass no title to the vendee, the statute being explicit that notice shall be given before such license can be granted: *French v. Hoyt*, 6 N. H. 370 [25 Am. Dec. 464].

It is said that the license in this case was not regularly issued, and for two reasons: 1. Because it did not fix the sum of money to be raised by the sale; and 2. Because there was no legal evidence of any debt sufficient to warrant it.

The section of the statute upon which the first position is founded is as follows: "The judge in such license shall fix the sum of money to be raised by such sale, and may, when he shall judge it expedient, specify the tracts or parcels to be sold:" R. S., c. 164, sec. 5.

It would seem, perhaps, upon the first reading of this section, that this license was defective, inasmuch as it does not state the amount for which the sale is to be made; and were this the only section in regard to the subject, the position would probably be correct. But this petition and license are not founded upon that section of the statute, but upon the third section of the same chapter, which is as follows: "If the real estate is so situated that a part thereof can not be sold without injury to the persons interested therein, license may on application be granted to sell the whole of such estate, though it may be more than sufficient for the payment of said demands."

This petition sets forth that the property is more than sufficient to pay the demands, but that it is so situated that a part of it can not be sold without injury to the persons interested therein; and the decree is, that the petitioner have license to sell the whole, according to the prayer of the petition. The petition and decree are thus both according to the third section; and to fix the sum to be raised by such a license would seem to be a contradiction in terms, if not indeed a prohibition, of the sale itself. It would at best be entirely superfluous.

We think the fifth section must have been intended to refer to licenses generally, where it becomes necessary to sell a part

of the real estate of the deceased to pay his debts. In such licenses there is good reason why the sum should be fixed; otherwise the administrator might proceed to sell beyond what was necessary. Accordingly it was held in *Adams v. Morrison*, 4 N. H. 166 [17 Am. Dec. 406], that if an administrator, having license to raise a particular sum by the sale of land, sells an entire tract for a sum exceeding that which he is authorized to raise, the sale will be void.

Different sections of the same act must, if possible, be so construed as to be consistent with each other; and to require the sum to be fixed in a license of this kind would be to make the fifth section inconsistent with the third.

The second objection to the decree, that there was no legal evidence of any debt sufficient to warrant it, is also untenable. It being shown that the petition was in due form, and that regular and legal notice of it was given to the heirs and all concerned, it was a matter within the jurisdiction and discretion of the judge of probate to say whether, upon the evidence furnished him, he would grant the license or not; and the exercise of his judgment upon that question can not be inquired into in this collateral way. His decision was open to appeal, and its correctness could have been tested in this court, and the decree affirmed or disaffirmed, as the right should appear.

Or it was in the power of the heirs to have prevented the license by complying with the provisions of section 4, chapter 164, revised statutes. That section provides that "no such license shall be granted if the heirs or devisees will give to the judge a bond, with sufficient sureties, for the payment of such just demands and to indemnify the administrator therefrom."

The case of *Heath v. Wells*, 5 Pick. 140 [16 Am. Dec. 383], cited by the defendant, is easily to be distinguished from the one before us. There the license was granted to sell to pay debts barred by the statute as to administrators; the suit against the administrator had not been seasonably commenced, and the court said that it was a matter where the probate court had no cognizance; that it was not a case for deliberation or decision by the probate court, and was not within their jurisdiction. In this case there are no such obstacles. But the doctrine even of that case would seem to be in conflict with *Hodgdon v. White*, 11 N. H. 209, and we do not intend to say that, according to our practice, there should not have been an appeal.

It will be perceived that, according to the view which we have taken of this question, it becomes immaterial whether the

proceedings to establish the private claim were legal or not, as its existence or non-existence would not affect the validity of the license. We have not, therefore, considered the matter.

The other question raised by the case relates to the competency of the witness, he being a surety on the bond of the administratrix.

If this witness was incompetent, it was by reason of some breach in the covenant of the deed, and of his liability to make good that covenant. Nothing appears upon the case from which we can say that the covenant has been broken; but we may consider the question as though it had been.

Before a suit could be maintained upon the bond, an action would have to be brought and judgment obtained against the administratrix for some failure to administer the estate according to law, as in general all claims must be liquidated, either by confession or judgment, before they can be recovered by suit on a probate bond: *Rogers v. Wendell* [cited in *Judge of Probate v. Briggs*, 5 N. H. 69]. The interest of a surety; therefore, upon such a bond, until there be a suit for some default, which may lead to the prosecution of the bond, must be very remote.

In *Carter v. Pearce*, 1 T. R. 163, it was held that a surety on an administrator's bond was a competent witness for the administrator to prove a tender in a suit brought against the administrator for a debt due by the intestate, and upon the ground that it was a bare possibility that an action might be brought upon the bond. In that case there could be no doubt of the eventual liability of the surety, in case the administrator should become chargeable with the debt, and should fail to cancel it. And upon that decision the surety here would be competent, even should the court hold that a breach of the covenant in the deed was a matter for which the sureties on the bond would be liable.

But we do not so regard the law. The bond of an administrator covers the rights of creditors and heirs of the estate, but it does not go to the extent of the contracts and covenants which the administrator may make with the purchasers of the property belonging to the estate. Such covenants are personal; and such was the covenant in this deed. It was not a liability which the sureties upon the bond could be required to make good. The witness was therefore competent.

Judgment on the verdict.

EXECUTORS AND ADMINISTRATORS CAN NOT BIND ESTATE BY COVENANTS made upon sale of decedent's property, but may bind themselves personally: *Worthy v. Johnson*, 52 Am. Dec. 399, and cases cited in the note.

SALE BY AUTHORITY OF PROBATE COURT AFTER ITS JURISDICTION HAS ATTACHED can not be collaterally attacked: *Cox v. Davis*, 52 Am. Dec. 199, and cases cited in the note.

JUDGMENT OF PROBATE COURT CAN NOT BE QUESTIONED COLLATERALLY on account of any error or defect in it: See *Lynch v. Baxter*, 51 Am. Dec. 735, and cases cited in the note: *McDade v. Burch*, 50 Id. 407.

SURETY'S LIABILITY ON EXECUTOR'S OR ADMINISTRATOR'S BOND: See note to *Commonwealth v. Stob*, 51 Am. Dec. 519 et seq.; *Thompson v. Bondurant*, 50 Id. 136.

INTEREST OF WITNESS IN RESULT OF SUIT AS DISQUALIFICATION: See *Edgerly v. Shaw*, ante, p. 349, and cases cited in the note. A surety upon a cost bond may be a witness for a party to a suit upon the filing of a new and sufficient bond: *Hays v. Tuttle*, 48 Am. Dec. 309.

JURISDICTION OF PROBATE COURT TO ORDER A SALE OF REALTY depends on a petition and account: *Bloom v. Burdick*, 37 Am. Dec. 299, and cases cited in note.

DIFFERENT SECTIONS OF SAME STATUTE ARE TO BE CONSTRUED TOGETHER: *Stout v. Reyes*, 43 Am. Dec. 465. So of statutes *in pari materia*: *Neill v. Keese*, 51 Id. 747; *Dugan v. Gittings*, 43 Id. 306, and note citing prior cases.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

HUNT v. FIELD.

[1 STOCKTON, 26.]

GENERAL CREDITOR HAVING NO SPECIFIC LIEN on the debtor's property has no right to interfere with any disposition his debtor may see fit to make of it.

ATTACHING CREDITOR HAS SUCH LIEN UPON GOODS ATTACHED as a court of equity will recognize in order to investigate whether a conveyance was fraudulent, or a confession of judgment not made in good faith, where such conveyance or confession affected the property attached.

BILL BY ATTACHING CREDITOR TO HAVE CONVEYANCE AND CONFESSION OF JUDGMENT SET ASIDE as fraudulent may be joined in by other creditors of the defendant who contribute to the expenses of the suit, and must show for what the attachment was issued, that it was executed, and upon what property, and the defendant in attachment must be made a party to the suit.

BILL for injunction, and to have a conveyance and confession of judgment set aside. The injunction was granted by the lower court, and a motion made to dissolve it. The facts appear from the opinion.

Hoarsey and Whitehead, for the motion.

Barkalew, for the complainants.

By Court, WILLIAMSON, Chancellor. One Samuel Schoonmaker was carrying on a mercantile business at Paterson, in Passaic county. Prior to the twenty-seventh day of January last past, he conveyed all the goods and merchandise in his store to the defendants, Slawson, Barret & Co., a firm doing business in New York. He also confessed a judgment to the said firm in the

Passaic pleas for the sum of one thousand three hundred and sixty-eight dollars and sixteen cents. Prior in point of time to this conveyance and judgment, the said Schoonmaker had confessed in the same court a judgment in favor of others of the defendants, Field, Merritt & Co., of the city of New York, for the sum of three thousand seven hundred and thirty-seven dollars and thirty-five cents. The goods were delivered under the conveyance mentioned, and executions were issued upon the judgments, levies made, and the property advertised for sale by the sheriff.

On the twenty-seventh day of January last, the complainants caused a writ of attachment to be issued out of the circuit court of the county of Passaic, against Schoonmaker, as an absconding debtor.

The complainants have filed this bill, alleging the conveyance of the goods and the judgments confessed to be fraudulent, and praying an injunction against the sheriff and the rest of the defendants, restraining them from selling or otherwise disposing of the goods, and that the conveyance and judgments confessed to the defendants may be decreed null and void for fraud.

It is well settled that a general creditor having no specific lien on the debtor's property has no right to interfere with any disposition his debtor may see fit to make of it: *Edgar v. Clevenger*, 2 Green Ch. 258, 464; S. C., 1 Id. 258, and note to the case.

But the complainant in this case insists that he has, by virtue of his attachment, such a lien as a court of equity will recognize, in order to give him a standing in the court, to question the disposition of the debtor's property.

By the attachment act, the sheriff is commanded to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements, of such debtor, wheresoever they may be found, and it is declared that the writ shall bind the property and estate of the defendant so attached from the time of executing the same.

The act declares that the personal property attached shall remain in the safe keeping and care of the officer, in order to answer and abide the judgment of the court, unless the garnishee shall give bond for its forthcoming. It provides that where the garnishee denies having any property of the debtor in his possession, or of his being indebted to him, the plaintiff in attachment may, under certain circumstances, institute a suit at law against the garnishee, which shall be continued by the court

until the action against the defendant in attachment shall be adjudicated upon and determined.

The act in these and in various other ways has given every facility to the plaintiff in attachment to reach and secure the debtor's property, both real and personal. And to the auditors appointed by the court, from which the attachment may have issued, extraordinary powers are given to examine the wife of the defendant, and other persons, under oath, touching all matters relating to the trade, dealings, moneys, debts, effects, rights, credits, lands, tenements, property, and estate of the defendant, and his secret grants, or fraudulent transfer or conveyance of the same. And they may issue their warrant to the sheriff, or any constable of the county, commanding them to break open any house, chamber, room, shop, door, trunk, chest, or other place or thing, where they shall have reason to believe any property is deposited or secreted. And finally, it is enacted, that this act shall be construed in all courts of judicature in the most liberal manner for the detection of fraud, the advancement of justice, and the benefit of creditors.

Where the legislature has done everything in its power towards enabling the attaching creditor to reach the debtor's property, in whosesoever hands it may be, and has enjoined it upon all the courts of the state to give the most liberal construction to the act, for the purpose of ferreting out fraud—to advance justice and benefit the creditors—is it a sufficient reason, when this court is appealed to, to exercise its powers, in preventing the whole of the debtor's estate, real and personal, from being swept beyond the reach of the attachment by a fraudulent conveyance or judgment, to refuse its aid, and declare itself powerless, upon the ground that the plaintiff in attachment has no specific lien upon the property? By virtue of his attachment, the creditor attaches all the rights and credits by the express provisions of the act. What better lien does a judgment and execution creditor obtain? In fact, he gets none at all; for he can not, by virtue of his execution, levy upon or sell them.

In the case of *Melville v. Brown*, 1 Harr. (N. J.) 364, James Hoy, who had taken out an attachment against Brown, moved the supreme court for a feigned issue to try the *bona fides* of a judgment confessed to Melville. The supreme court denied the motion, upon the ground that if the applicant had gone into a court of chancery, the court would not have entertained his bill, because he was no more than a creditor at large. The

learned chief justice cites the leading American and English cases for the general principle that a creditor at large can not interfere with the disposition of his debtor's property. Two reasons are given why a court of equity would not interfere on behalf of an attaching creditor. First, the reason given by Chancellor Kent, in *Wiggins v. Armstrong*, 2 Johns. Ch. 144, that to permit such an interference might lead to an unnecessary, fruitless, and oppressive interruption of the rights of the parties. And this remark is made in view of the fact that upon investigation it may turn out that there is no debt due from the defendant to the plaintiff, and if so, the litigation would have been altogether fruitless, whether the judgment questioned was fraudulent or not.

But while such a reason may be good as respects a mere creditor at large, may it not be answered, that in reference to an attaching creditor, the act itself justifies, and almost commands, this interference? Does not the act put him, by virtue of his attachment, upon a very different footing from that of a mere creditor at large? And reviewing the object and policy of the act throughout, is it not obligatory upon courts of law and equity to construe the provisions of the act liberally, although it may occasion some delay, inconvenience, and expense to parties? The same inconvenience and oppression here suggested necessarily follow upon the execution of some of the provisions of the act. The auditors may bring suits for sums under one hundred dollars. Suppose they should sue and recover the money, and after all it should turn out that the defendant in attachment did not owe the plaintiff or anybody else anything; or suppose, after putting these alleged creditors of the defendant in attachment to the inconvenience and expense of a suit, it should turn out they were not creditors, how much expense, inconvenience, and oppression would be incurred and suffered to no purpose? The sheriff, under the direction of the auditors, may break open houses, trunks, and chests; or may demand of individuals having property in their possession supposed to be the defendant's to deliver it up to his custody, or to give bonds for its forthcoming when required; or he may, under certain circumstances, summon a jury to try the right to the property. If it should turn out in the end that the defendant in attachment owes nothing, there would be very great hardships, and in many instances very oppressive, and yet they must be endured, because the legislature have thought proper to impose them as burdens in order to promote the administra-

tion of justice. Surely, in view of all these proceedings, recognized and prescribed by the act, it can not be said that the creditor, or creditors, who are pursuing their rights under and by virtue of a writ of attachment, armed at every point with instruments and power to reach the debtor's property, or supposed property, whether secured by bars and bolts, or covered up in the hands of others under fictitious claims, have no more right in a court of chancery to question the disposition of such property than one whom the law has as yet provided with no process to follow and impound it.

But is not this idea of oppression very much imaginary? As far as the debtor is concerned, all his rights over the property are already interfered with and interrupted. The attachment has taken from him the custody and control of the property. But it may be in the hands of another who claims it under a judgment confessed, or under a mortgage given to him by the defendant in attachment. The attaching creditor, whom the law has permitted to take out a writ to impound the property until a court of law can ascertain judicially whether or not he is a creditor, files his bill, charging the judgment or mortgage to be fraudulent. If by his answer the court sees he has a clear conscience, his disposition of the property will not be interfered with. But if, out of his own mouth, he is convicted of fraud, what oppression is it for this court to control his actions over the property, until the court at law—where the legal proceedings have been instituted shall have judicially determined whether there are any, and if so, who are the creditors entitled to investigate the fraud?

By the provision of the act already referred to, where the plaintiff in attachment sues the garnishee, and holds him to bail, the court continues the suit until the action against the defendant in attachment shall be adjudicated upon and determined.

But it is said again that the plaintiff has no lien upon the defendant's goods; and the case of *Melville v. Brown*, 1 Harr. (N. J.) 364, is referred to as authority. The court do there say that the plaintiff has no lien upon the goods—that they are not in his custody or subject to his control—that he never had possession of them, and could not therefore acquire a lien upon them, such as an attorney has upon deeds and papers for his costs; a factor upon goods consigned to him, for his claims as factor; a common carrier upon the goods he has carried, for his wages; or an innkeeper upon the horse of his guest, for the

amount of his bill. This is true; nor has a judgment and execution creditor any such lien, nor any possession or control of the property levied upon. The court says: "Goods, when properly attached, are strictly in the custody of the law." And so they are when levied upon by virtue of an execution. The plaintiff has no more control over them in the one case than in the other. And this court will interfere if any such control is attempted to be exercised: *Edgar v. Clevenger*, 1 Green Ch. 263. The court in *Melville v. Brown*, *supra*, say: Liens are of two kinds: 1. Such as a party acquires by his own act; or 2. Such as the law creates; as in case of judgment and execution. But why not add "attachment" also, for by the very terms of the act the attachment binds the property and estate of the defendant attached from the time of executing the same. What is this but creating a lien upon the property for such debts, if any, as may be found due by the judgment of the court to the plaintiff in attachment, and other applying creditors.

By the act respecting executions, statutes of New Jersey, R. S. 977, sec. 3, the same word "bind" is used as in the attachment act.

I do not feel myself at liberty to draw a distinction between the nature of a lien by virtue of an execution, and that of a lien by virtue of an attachment; nor should I consider I was giving to the act a liberal construction for the detection of fraud, if upon so nice a question I should refuse to a complainant the aid of this court in investigating the *bona fides* of an alleged fraudulent judgment or conveyance.

Upon the argument, the case of *Quackenbush v. Van Blarcom* was referred to, which was a case, upon this point, in every respect like the one before the court. It is not reported. The chancellor's opinion was mislaid and not published, but I have examined the papers on record. Chancellor Pennington sustained the bill. I have seen the brief of counsel who argued that case. This point was discussed, and the case of *Melville v. Brown* was relied upon. I am likewise informed that Chancellor Halsted sustained a like bill. Had the opinions of the chancellors been published, I should have felt satisfied to have acquiesced in their views, without giving my own at length.

But this bill is informal and deficient in several particulars, and can not be sustained.

The bill ought to have been framed for the benefit of the complainant, and such others of the creditors of the defendant as should come in and seek relief by and contribute to the ex-

penses of the suit. The bill does not allege for what amount the attachment was issued, nor that it was ever executed, nor what property was attached, whether real or personal, nor whether any property at all was attached. It would seem rather from the bill that the goods and chattels which were subject to execution were not attached for that reason. There certainly is no allegation in the bill that the property claimed by these judgment creditors was attached. As to the books of account, which the bill alleges were fraudulently conveyed to some of the defendants, it is stated that the sheriff, on levying the said writ of attachment upon the books, it was ascertained the defendant, the day before he absconded, had assigned them to some of the defendants, but whether the sheriff found the books and attached them is not stated.

The defendant in attachment is not made a party to the suit. There can be no decree without him. The bill is therefore also defective for the want of the necessary parties.

For the reasons stated, let the injunction be dissolved, with costs.

LIEN OR ATTACHMENT: See note to *Jackson v. Ramsey*, 15 Am. Dec. 253; *Fettyplace v. Dutch*, 23 Id. 688; *Carter v. Champion*, 21 Id. 695; *Thoms v. Southard*, 26 Id. 467. See also extensive note to *Franklin Bank v. Bachelder*, 39 Id. 601, note 606.

THE PRINCIPAL CASE IS CITED to the point that an attaching creditor has such a lien upon the goods attached as will give him a standing in a court of equity, in *Williams v. Michenor*, 3 Stock. 520; *Oakley v. Pond*, 1 McCart. 180; *Robert v. Hodges*, 1 C. E. Green, 302; *Curry v. Glass*, 10 Id. 108.

HOWELL v. ASHMORE.

[1 STOCKTON, 82.]

BILL FOR DISCOVERY WILL BE GRANTED MORE READILY, and with less nice application of technical rules, than a bill for an injunction to stay proceedings at law, or to interfere with such proceedings in any way.

BILL FOR DISCOVERY NEED NOT STATE that the discovery is absolutely necessary; it is sufficient to state that it is material.

AVERMENT OF MATERIALITY AND NECESSITY OF DISCOVERY.—Bill for discovery which does not distinctly aver that the discovery is material and that the facts can not be otherwise proved, but which asks the defendant to discover whether he had knowledge of a prior unrecorded deed, and states that the party from whom the deed was procured lives out of the state, and that there were no witnesses thereto, and that the defendant has at all times refused to give any information in relation thereto, sufficiently shows the materiality of the testimony, and that it can not be procured from any other source.

MERE CLERICAL MISTAKE of a single figure the court will permit to be corrected instanter upon suggestion, unless the opposite party has been misled by it.

BONA FIDE PURCHASER FOR VALUE IS ENTITLED TO HAVE HIS TITLE PROTECTED by a court of equity, and will not be compelled to discover anything which will invalidate his title; but where he is charged with fraud, a court of equity will compel him to disclose the facts alleged as fraud.

IT IS PROPER OBJECT FOR BILL OF DISCOVERY to ascertain, in a case where the defendant's title can only prevail upon the ground of his being a bona fide purchaser without notice of the plaintiff's title, whether he had such notice, and to call upon him to disclose all the circumstances which may go to probe his conscience upon that point.

IN COURT IN WHICH ACTION IS BROUGHT CAN COMPEL DISCOVERY, a court of equity will not interfere.

THE RIGHT TO CALL DEFENDANT AS WITNESS AT TRIAL does not prevent the plaintiff from maintaining a bill of discovery against him before the trial. He may need the facts discovered at the trial, or he may bring the bill before the suit has been commenced, to enable him to frame his declaration.

THAT BILL OF DISCOVERY SEEKS DISCOVERY FROM DEFENDANT who is a mere witness, and has no interest in the suit, is, as a general rule, a good objection to it.

BILL FOR DISCOVERY MERELY MAY BE MAINTAINED against a corporation and its officers.

BILLS FOR DISCOVERY ARE FAVORED IN EQUITY, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction.

BILL for discovery to aid proceedings at law. The bill states that Sarah Milward, the wife of John Milward, was the owner of certain land, and that in September, 1814, for the consideration of one hundred dollars, the said John and Sarah Milward granted said land to Joseph Ashmore, but the acknowledgment of Sarah did not state that she had been examined separate and apart from her said husband. Joseph Ashmore went into possession under this deed, and so remained until June, 1816, when for a valuable consideration he sold it to James Ashmore, the brother of the defendant. James, at this time being about to leave the state, put his brother, the defendant, into possession, with the understanding that he was to cultivate it and support his aged father. Defendant maintained possession under this agreement until the death of his father, in 1846. James Ashmore, in December, 1845, for two hundred dollars, conveyed to plaintiff the premises in dispute, and this deed of conveyance was duly acknowledged and recorded. Plaintiff at this time had no knowledge of the defect in the Milward deed, but afterwards discovering it, he procured a deed from Mrs. Milward,

on the twenty-fourth day of June, 1847, for the consideration of one dollar. This deed was not recorded until April, 1848. The bill further recites that defendant had knowledge of this deed, but finding it not recorded, he procured a deed from Mrs. Milward, dated September 20, 1847, purporting a consideration of one hundred and seventy dollars, which deed was recorded the next day. The remaining facts appear from the opinion.

Beasley, for the plaintiff.

Dayton, for the defendant.

By Court, Williamson, Chancellor. This is a bill for discovery only. The complainant asks the discovery in aid of his prosecution of a suit at law, instituted by him against the defendant in the supreme court, and for the purpose of using the disclosure upon the trial of the said suit. No interference with that suit is asked, nor is relief prayed for. The principles applicable to a bill for discovery only are in some respects different from those which govern the court where the bill prays for an injunction to stay proceedings at law or in any way to interfere with such proceedings until the bill is answered; or where, in addition to the discovery, relief is prayed for. In the case of a bill for mere discovery, if it appears reasonable that the complainant should be entitled to the disclosure, and no principles of law or equity are violated in enforcing it, as the complainant must pay the costs of the suit, whatever may be the defendant's answer, the court will not be as nice in the application of technical rules as where an injunction or relief is asked for: *Seymour v. Seymour*, 4 Johns. Ch. 409; *Bishop of London v. Fytche*, 1 Bro. C. C. 96.

For instance, in a bill for discovery only, "it is not necessary to aver that the discovery is absolutely necessary or indispensable to the defense. It will be sufficient to state and show that it is material evidence. Thus, for example, it is not necessary to allege in the bill that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought; for he is entitled to it, if it be merely cumulative evidence of material facts. It would be otherwise if the bill should not only ask discovery, but should ask relief in equity:" Story's Eq. Pl., sec. 324.

An objection was made to this bill, because it does not sufficiently aver that the complainant can not make proof of the facts of which discovery is sought without the aid of this court.

If the interference of this court was asked with the suit at

law, then perhaps the bill or affidavit ought to have stated the belief of the complainant that the answer would furnish discovery material for the defense, and that the complainant had no means of obtaining the facts without such discovery: *Seymour v. Seymour, supra.* But no interference is asked for; and besides, though there is no direct averment that the disclosure is material and requisite, the case made by the bill, and which the demurrer admits, shows manifestly the materiality and importance of the facts of which discovery is asked. As regards the most important fact, and the one which it is the principal object of the bill to reach, to wit, whether, at the time the defendant obtained the deed from Mrs. Milward he had knowledge of the plaintiff's deed from her of the twenty-fourth of June, 1847, that is a matter so peculiarly within the exclusive knowledge of the defendant that it might almost be considered as superfluous to aver, even if formality required it, that the plaintiff had not the means of obtaining the fact without such discovery.

The bill alleges that the deed from Sarah Milward to the defendant, and which he sets up to defeat the plaintiff's title, was privately and secretly executed, and that the defendant has at all times refused to all persons to give any information in relation thereto—that Sarah Milward resides out of the state, and that the complainant can not discover whether she is aware that the defendant, at the time when she made the deed to him, had knowledge or information of the deed to the complainant; and that the complainant has been unable to discover who were present at the execution of the deed.

With regard to all the other facts and circumstances of which the defendant is called upon to make disclosure, they all relate to and bear upon the material question—whether or not the defendant was a *bona fide* purchaser without notice.

I think the bill sufficiently shows the materiality of the facts to the plaintiff's case at law, and also that he can not safely rely upon any testimony from other sources to supply the evidence.

It is again objected that the complainant does not show his action at law was commenced subsequent to the time when his title accrued. It is true this is not very explicitly stated, but it is evident the counsel who drew it supposed that it so appeared by the bill. There is certainly a confusion as to dates, arising from want of care. The bill states the complainant commenced his action of ejectment, and such proceedings were had therein that in the July term of the supreme court, in the year last aforesaid, the said Thomas Ashmore appeared, etc. The year "last

"aforesaid" in the bill is the year 1848, and yet it is stated that the cause was noticed for trial in September, 1847. There is certainly a mistake as to dates.

But the complainant, after setting forth the manner in which his title accrued, states that having then become entitled to the said premises, he went to take possession, and the defendant refusing to deliver the possession, he commenced his suit. The whole statement of the case by the bill shows, I think, clearly that the suit was commenced after the plaintiff's title accrued, but before he had his deed recorded. A mere clerical mistake of a single figure the court would permit to be corrected *instanter* upon the suggestion, unless by any possibility the defendant had been misled by it.

It is further insisted in support of this demurrer, that the subject-matter is not one entitling the complainant to a disclosure from the defendant; that a defendant can not be compelled to discover his own title; that the prayer of the bill is not simply a discovery as to whether the defendant had notice, but of the consideration the defendant gave for the property, and of other matters attending the purchase.

"One of the fundamental rules of this branch of equity jurisprudence is, that the plaintiff is entitled only to a discovery of what is necessary to maintain his own title, as, for example, of deeds under which he claims. But he is not entitled to have a discovery of the title of the other party from whom he seeks the discovery:" Story's Eq. Jur., sec. 317.

In this case, the bill does not seek a discovery of the defendant's title, nor of the defense he seeks to set up against the plaintiff's right of recovery. But the complainant alleges that the defendant has procured a title, which title the complainant sets out in his bills, and insists that such title ought not to prevail against his, and that the defendant procured his title with notice of the complainant's prior title. All he seeks to discover is, whether the defendant had the notice at the time of his purchase.

A *bona fide* purchaser without notice, and for a valuable consideration, is entitled to have his title protected by this court, nor will he be compelled to discover anything which will invalidate that title. But when the defendant is charged with fraud, and that he has procured a title fraudulently, and is fraudulently setting it up to defeat the complainant, it is the peculiar jurisdiction of a court of chancery to compel such a fraud-doer to disclose the fact alleged as a fraud, and all the circumstances

attending the act, in order that the court may determine whether those circumstances establish the fraud or not.

The defendant is called upon by this bill to state whether he had notice of the complainant's deed, and the circumstances under which he procured his own deed, in order that by them it may be determined whether he is a *bona fide* purchaser without notice. The disclosure sought is as to the notice, and inquiry is made as to the consideration he paid, and of other circumstances only as they affect this point. They all bear upon the question of notice, and are introduced to test the defendant's conscience as to that matter.

It seems never to have been questioned but that the object which is sought by this bill is a proper one for discovery.

A defendant may object to the discovery that he is a *bona fide* purchaser of the property for a valuable consideration, without notice of the plaintiff's claim. To entitle himself to this protection, he must not only be a *bona fide* purchaser, and without notice, and for a valuable consideration, but he must have paid the purchase money: Story's Eq. Jur., sec. 1502. But was it ever objected that he could not be compelled to disclose whether he was a *bona fide* purchaser without notice, or what consideration he gave, or the circumstances under which he purchased?

"If a defendant has in conscience a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title; and if the matter appears clearly on the face of the bill, a demurrer will hold. The most obvious case is that of a purchaser for a valuable consideration without notice of the plaintiff's claim:" Mitford's Pl. 162.

But upon the case made by this bill, has this defendant, in conscience, a right equal to that claimed by the complainant? Is it not most unjust that a title acquired in the manner as it is alleged the defendant's was should be set up and prevail? The defendant has no equity whatever. He admits by his demurrer the fraud he has practiced, and insists that the court should aid him in taking advantage of it, by extending to him the same protection that a man holding an honest title would have a right to claim.

In *Jerrard v. Saunders*, 2 Ves. jun. 187, the bill was filed for discovery of deeds relating to the plaintiff's title, and to restrain proceedings in ejectment. The bill charged constructive

notice of a settlement in the party under whom the defendant claimed. The defendant pleaded purchase for valuable consideration, and averred that J. D., under whom he claimed, had not to his knowledge or belief any notice of the title set up by the plaintiff. The lord chancellor says he must set forth the facts charged in the bill, from which the court will construe notice. He assumes to himself the proposition. He judges what is constructive notice, and then denies that to his knowledge and belief he had constructive notice. The bill does not impute direct notice to him. He must let the court judge of that. The plea was overruled. The case is further reported in the same book, p. 454. The defendant answered, and fully and in the most precise terms denied all the circumstances alleged, from which notice might be inferred. He showed he was a *bona fide* purchaser without notice, and then the chancellor said that against such a purchaser the court will not take the least step imaginable, and no advantage the law gives him shall be taken from him. But it was not set up in that case that the subject-matter of which discovery was sought was one of which the defendant could not be called upon to make disclosure, on the ground it was discovering his own title.

In *Claridge v. Hoare*, 14 Ves. 59, Lord Eldon says: "It is then said this plea [referring to the plea in that case] should be supported by an answer. Such a plea does not require the support of an answer as a plea of purchase for valuable consideration without notice does. That plea requires the aid of an answer, the bill insisting upon notice and charging facts to make that out. The defendant must answer, either admitting, denying, or qualifying all the circumstances upon which it is contended that if the defendant will speak, notice, though denied, will appear."

It appears to me very clear that it is a proper object for a bill of discovery to ascertain, in a case where the defendant's title can only prevail upon the ground of his being a *bona fide* purchaser without notice of the plaintiff's title, whether he had such notice, and to call upon him to disclose all the circumstances which may go to probe his conscience upon that point.

In support of this demurrer, it is further insisted that under the act of the legislature of this state of March 1, 1849, the plaintiff can call upon the defendant as a witness upon the trial of the suit in ejectment, and that therefore this bill is objectionable upon two grounds: 1. That this court is called upon to assist a suit in another court competent to grant the relief

attending the act, in order that the court may determine whether those circumstances establish the fraud or not.

The defendant is called upon by this bill to state whether he had notice of the complainant's deed, and the circumstances under which he procured his own deed, in order that by them it may be determined whether he is a *bona fide* purchaser without notice. The disclosure sought is as to the notice, and inquiry is made as to the consideration he paid, and of other circumstances only as they affect this point. They all bear upon the question of notice, and are introduced to test the defendant's conscience as to that matter.

It seems never to have been questioned but that the object which is sought by this bill is a proper one for discovery.

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"If a defendant has in conscience a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title; and if the matter appears clearly on the face of the bill, a demurrer will hold. The most obvious case is that of a purchaser for a valuable consideration without notice of the plaintiff's claim:" Mitford's Pl. 162.

But upon the case made by this bill, has this defendant, in conscience, a right equal to that claimed by the complainant? Is it not most unjust that a title acquired in the manner as it is alleged the defendant's was should be set up and prevail? The defendant has no equity whatever. He admits by his demurrer the fraud he has practiced, and insists that the court should aid him in taking advantage of it, by extending to him the same protection that a man holding an honest title would have a right to claim.

In *Jerrard v. Saunders*, 2 Ves. jun. 187, the bill was filed for discovery of deeds relating to the plaintiff's title, and to restrain proceedings in ejectment. The bill charged constructive

notice of a settlement in the party under whom the defendant claimed. The defendant pleaded purchase for valuable consideration, and averred that J. D., under whom he claimed, had not to his knowledge or belief any notice of the title set up by the plaintiff. The lord chancellor says he must set forth the facts charged in the bill, from which the court will construe notice. He assumes to himself the proposition. He judges what is constructive notice, and then denies that to his knowledge and belief he had constructive notice. The bill does not impute direct notice to him. He must let the court judge of that. The plea was overruled. The case is further reported in the same book, p. 454. The defendant answered, and fully and in the most precise terms denied all the circumstances alleged, from which notice might be inferred. He showed he was a *bona fide* purchaser without notice, and then the chancellor said that against such a purchaser the court will not take the least step imaginable, and no advantage the law gives him shall be taken from him. But it was not set up in that case that the subject-matter of which discovery was sought was one of which the defendant could not be called upon to make disclosure, on the ground it was discovering his own title.

In *Claridge v. Hoare*, 14 Ves. 59, Lord Eldon says: "It is then said this plea [referring to the plea in that case] should be supported by an answer. Such a plea does not require the support of an answer as a plea of purchase for valuable consideration without notice does. That plea requires the aid of an answer, the bill insisting upon notice and charging facts to make that out. The defendant must answer, either admitting, denying, or qualifying all the circumstances upon which it is contended that if the defendant will speak, notice, though denied, will appear."

It appears to me very clear that it is a proper object for a bill of discovery to ascertain, in a case where the defendant's title can only prevail upon the ground of his being a *bona fide* purchaser without notice of the plaintiff's title, whether he had such notice, and to call upon him to disclose all the circumstances which may go to probe his conscience upon that point.

In support of this demurrer, it is further insisted that under the act of the legislature of this state of March 1, 1849, the plaintiff can call upon the defendant as a witness upon the trial of the suit in ejectment, and that therefore this bill is objectionable upon two grounds: 1. That this court is called upon to assist a suit in another court competent to grant the relief

here sought; 2. That you can not have a bill of discovery in aid of a suit pending against any one who is a competent witness in that suit.

As to the first ground. The principle is correctly laid down in Story's Eq. Jur., sec. 1495, in Cooper's Eq. Pl., c. 3, p. 191, and in Mitford's Pl. 52, that in the case of suits merely civil, in a court of ordinary jurisdiction, if that court can itself compel the discovery required, a court of equity will not interfere. The cases referred to in support of the principle are those of *Dun v. Coates*, 1 Atk. 288, and *Anonymous*, 2 Ves. sen. 451, which were cases where the plaintiffs sought a discovery in aid to the ecclesiastical jurisdiction, and in which cases the discovery was denied on the grounds as stated by the lord chancellor, that "the coming into this court in aid of the ecclesiastical jurisdiction is always denied here," and the party does not there want it, "because he may exhibit articles in that court, and have an answer on oath, which is the constant method there."

It would seem that in the ecclesiastical courts the party could exhibit articles in the nature of a bill of discovery, and have an answer on oath which would afford him the same relief as a bill of discovery would in the court of chancery.

But is the supreme court, where this suit is pending, to assist which this bill has been filed, competent to grant the same relief which this court is able to afford the plaintiff in this proceeding?

That court can compel no discovery by any proceeding in the nature of a bill of discovery. It can compel the defendant to answer as a witness on the trial of the cause if called upon by the plaintiff. But the disclosure he may make then may be of no avail to the plaintiff. The plaintiff has a right to the discovery, before the trial, to aid him in preparing to meet the very case the defendant may make by the disclosure. A party may exhibit his bill before his suit is commenced, so as to enable him rightly to frame his action and declaration: Story's Eq. Jur., sec. 1495, and cases cited in the note.

In Story's Eq. Jur., secs. 1486, 1487, the means provided by the Roman law for obtaining the oath of parties is stated. Interrogatories in writing were propounded, which were answered by the other party under oath, and the relief afforded was as effectual as that obtained by a bill of discovery in a court of chancery.

The mode of proceeding in the ecclesiastical and civil courts is concisely pointed out in Story's Eq. Pl., sec. 850: "In the civil

law the defendant first puts in his defensive allegation to the claim made by the plaintiff, and after an answer to that is put in the plaintiff propounds, in a sort of supplemental libel, called the *libellus articulatus*, his interrogatories respecting the charges made in the positions of the plaintiff, as they are called, (that is) in his bill of complaint; and the defendant then responds to those interrogatories. In the ecclesiastical courts, where also the defendant is required to make an answer or discovery upon oath, the answer to the interrogatories is in a wholly distinctive instrument from the responsive allegation (as it is called) to the libel which contains the defense of the defendant."

But the remedy afforded by our statute was not intended to supply the place of a bill of discovery. It does not afford the adequate relief, for it does not meet the wants of the party.

As to the other ground, that you can not have a bill of this nature in aid of a suit at law against one who is a competent witness in the suit; the general rule is, that it is a good objection to a bill of discovery that it seeks a discovery from a defendant who is a mere witness and has no interest in the suit. But the rule has its exceptions: Story's Eq. Jur., sec. 1499; Cooper's Eq. Pl. 200.

Whenever the rule is laid down, this reason is always given for it: that there is no ground for a bill of discovery, since his answer would not be evidence against any other person. The reason is not applicable here.

One exception to the rule is the case of making the agents, officers, and directors of a corporation parties. There are reasons given for this exception in the authorities where such bills have been sustained, but no better reasons, nor as good as those which may be suggested, why the case before us should not be an exception to this general rule.

In the case of *Glasscoll v. Copper Miners' Company*, 11 Sim. 305, the doctrine was firmly established that a bill for discovery merely may be maintained against a corporation and its officers.

If these objections prevail, it strips the court very much, if not entirely, of its jurisdiction in cases of this kind.

As the object of this jurisdiction is to assist and promote the administration of public justice in other courts, bills of discovery are greatly favored in equity, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction: Story's Eq. Jur., sec. 1488.

Now the statute of 1849 was passed for the benefit of the party who might see fit to call upon his adversary in a suit to testify as a witness; but if this court should determine that the statute deprives the plaintiff in this suit of the benefit of this bill, and thus compels him to resort to his adversary as a witness on the trial, this statute, instead of proving, as it was intended, an advantage in the prosecution of his suit, may operate greatly to his prejudice. It compels him to make the defendant a witness not only as to the simple fact about which he wishes to interrogate him, but makes him a witness in his own cause, competent to give testimony on his own behalf.

But this principle, which has heretofore governed courts of equity in entertaining bills of discovery, is not an inflexible rule, and one which can not or ought not to be subservient to any new exigency that may arise in the administration of justice.

Here is presented a new question. The legislature has not, by positive act, abolished or limited the jurisdiction of this court as to bills of discovery, but has introduced a new principle unknown to the common law. A party in a suit may now call upon his adversary as a witness. It is a general rule regulating the practice of the court of chancery, that a bill for discovery could not be maintained against one who might be a witness in the suit. It is a rule of policy, founded upon good and substantial reasons. Under the peculiarity of this statute a new case has arisen, one to which the rule referred to could not have been applicable when it was adopted, for such a case could not then have arisen. We have now to deal with it, and it is a question addressed to the sound discretion of the court, whether the ends of justice will be best promoted by making a case like that before us an exception to the rule.

I do not think that this statute ought to deprive the plaintiff of his right to file his bill in this court to aid him in the prosecution of his suit at law. I do not think that he should be compelled to resort to the alternative of making the defendant a general witness in the suit, or be deprived of having the benefit of a disclosure before the trial, so that he may prepare himself to meet the facts which may be presented by the disclosure which he seeks.

Let the demurrer be overruled with costs.

BILL FOR DISCOVERY of deeds, which complainants allege are material to him, must allege that they are in the possession of the defendant: *Hough v. Martin*, 34 Am. Dec. 403. Equity has jurisdiction to compel discovery of the amount of a lost note: *Truly v. Lane*, 45 Id. 303. So where bill for discovery

charges bequest upon secret trust, the defendant must answer as to the truth of the charges: *Thompson v. Newlin*, 42 Id. 169; and equity will compel the discovery of a secret trust, to enforce it if lawful, or to declare it void if unlawful: *Brown v. Clegg*, 51 Id. 413. Party having equitable claim has a right to a discovery under oath from the defendant, to have all the proofs on which his claims depend taken in due form, and submitted to the decision of a court of equity: *Hardy v. Summers*, 32 Id. 167.

To DETECT FRAUD AND IMPOSITION, and to set aside a fraudulent conveyance, a discovery will be decreed, and the fact that a third person is acquainted with the facts is no ground for demurrer. This objection must be raised at the hearing: *Skinner v. Judson*, 21 Am. Dec. 691.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

IN THE MATTER OF FETTER.

[3 ZARROKIN, 311.]

SURRENDER OF FUGITIVE FROM JUSTICE IS MADE OBLIGATORY UPON EVERY MEMBER OF CONFEDERACY by art. 4, sec. 2, of the constitution of the United States, which provides that such fugitive from one state found in another "shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime;" but the clause contains no grant of power; it is a regulation of a previously existing right.

SOVEREIGN STATE HAS RIGHT TO SURRENDER TO FRIENDLY NATION OFFENDER AGAINST LAWS OF LATTER, whatever may be the difference of opinion in regard to its obligation so to do.

POWER OF ARRESTING AND DETAINING OFFENDER AGAINST LAWS OF OTHER COUNTRIES EXISTS OF NECESSITY, if a right exists in every sovereign state, independent of constitutional provision or treaty obligation, to surrender such fugitive, and this principle applies with far greater force in support of an express constitutional provision making the surrender obligatory.

FUGITIVE FROM JUSTICE FROM ANY OF UNITED STATES MAY BE ARRESTED AND DETAINED IN ANOTHER STATE, under art. 4, sec. 2, of the constitution of the United States, preparatory to his surrender, before a requisition is actually made by the executive of the state where the crime is committed.

CRIME MAY BE STATUTORY, AND NEED NOT BE COMMON-LAW OFFENSE, to warrant detention or surrender of fugitive from justice, within the meaning of the constitution of the United States.

FUGITIVE FROM JUSTICE FROM ONE STATE WILL BE DETAINED IN ANOTHER, where, although the original affidavit upon which the warrant issued was defective in not alleging that any crime had been committed in the state from which he was claimed to be a fugitive, it appeared by a subsequent affidavit and evidence adduced that the alleged crime was committed therein.

FUGITIVE FROM JUSTICE FROM ONE STATE DETAINED IN ANOTHER ORDERED
DISCHARGED, when it appeared that a sufficient time had elapsed since
the commitment for a demand for a surrender of the prisoner by the
executive of the state where the crime was committed.

HABEAS CORPUS directed to the keeper of the common jail of Mercer county. The return to the writ showed that the prisoner, William Fetter, was detained as a fugitive from justice from California, under a commitment issued by a justice of the peace, which directed that he be held in custody "to await the requisition of the governor of California, or otherwise be thence delivered by due course of law." It appeared upon the hearing that Fetter was a citizen and resident of Pennsylvania, but carried on business in New Jersey; and that a requisition upon the governor of Pennsylvania by the governor of California had been made for his surrender as a fugitive from justice from California, where he stood accused of the crime of grand larceny. An exemplified copy of an indictment found by the grand jury of San Francisco county against Fetter accompanied the requisition, and charged that Fetter was the bailee of gold-dust of the value of three thousand and seven hundred dollars, and being such had converted it to his own use with intent to steal the same. The governor of Pennsylvania had issued a warrant for the arrest and surrender of Fetter, but the latter came into New Jersey, where he remained until arrested under the authority of the latter state.

Beasley, for the prisoner.

Lanning, for the prosecution.

By Court, GREEN, C. J. The constitution of the United States, art. 4, sec. 2, provides that a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. It is insisted that the whole authority conferred by the constitution, or fairly deducible from it, is consequent upon the demand made for the surrender of the fugitive. That the prisoner has committed no offense against the sovereignty of this state which can justify his arrest, and that consequently any arrest by authority of this state for a crime committed without its jurisdiction prior to a demand actually made under the provision of the constitution for the surrender of a fugitive, is unauthorized, and his detention illegal.

In considering this question, it is material to observe that this clause of the constitution does not contain a grant of power. It confers no right. It is the regulation of a previously existing right. It makes obligatory upon every member of the confederacy the performance of an act which previously was of doubtful obligation. All writers upon the law of nations agree that it is the right of every sovereign state to expel from its territory, or to surrender to another nation in amity with it, an offender against the laws of such friendly nation. No state is bound to harbor criminals within its bosom, but may at its option surrender them to the government against whose laws they have offended. Whether any government is bound to make such surrender upon the demand of the sovereign of another nation in amity with it, upon the principle of the comity of nations, is another question, upon which jurists and courts are not agreed. It is held by some writers of high authority upon the law of nations that such duty does exist: Vattel, b. 2, c. 6, sec. 76; 2 Burlam. 179, secs. 23, 27; Story's *Conf. L.*, sec. 627.

The obligation was recognized by Chancellor Kent, in the case of Washburn, a fugitive from Canada to the state of New York: *Matter of Washburn*, 4 Johns. Ch. 106 [8 Am. Dec. 548]; and also by the supreme court of Canada, in the case of Joseph Fisher, a fugitive from justice in the state of Vermont: *Rex v. Ball*, 1 Am. Jur. 297; 1 Kent's Com. 37.

Other writers insist that the right, as between independent sovereign nations, to demand of each other fugitives from justice, does not exist independent of treaty obligations, and such appears to be the decided weight of authority in this country. The United States government have never recognized the right, unless under treaty stipulations: *Commonwealth v. Dracut*, 10 Serg. & R. 135; *Case of José Ferrara Dos Santos*, 2 Brock. 493; *United States v. Davis*, 2 Sumn. 486; Story's *Conf. L.*, sec. 626; 2 Story's Com. on Con., sec. 1808; Jefferson's Letter to Washington, 7th November, 1791; Jefferson's Letter to Genet, 1793, 1 Am. St. Pap. 175; Story's Letter to Gov. Everett, June 6, 1825, cited in 2 Life of Story, 179; 1 Kent's Com. 37, note.

But whatever difference of opinion may exist regard to the obligation resting upon one nation to surrender a fugitive from justice, upon the demand of another nation in amity with it, there is no denial and no question of the right of every sovereign nation to surrender fugitives within its territory. The whole effect of the constitution was to confer upon each mem-

ber of the confederacy a right to demand from every other member of the confederacy a fugitive, and to make obligatory the surrender which was before discretionary. If, then, there exists, independent of constitutional provision or treaty obligation, a right in every sovereign state to surrender criminals against the laws of other countries, there must also, of necessity, exist in every state the power of arresting and detaining such fugitive. The mere power of surrender, without the power of arrest and detention, would be nugatory. It is remarkable, indeed, that both the constitution and the act of congress of 1793 assume that the one power is a necessary consequence of the other. Neither the constitution nor the law confers, except by implication, the power of arrest or imprisonment.

We find this right of arrest and imprisonment by the civil magistrates of offenders against the laws of another government recognized from a very early period. Thus in *Rex v. Hutchinson*, 29 Car. II., 3 Keble, 785, the court of king's bench, upon *habeas corpus*, refused to bail a prisoner who was committed on suspicion of murder committed in Portugal. And in the case of *Lundy*, 2 Vent. 314, it was agreed, on a consultation of all the judges, that there was nothing in the *habeas corpus* act to prevent a person guilty of a capital offense in Ireland (then a distinct kingdom) being sent there to be tried.

In the case of *Rex v. Kimberley*, 2 Stra. 848, the prisoner was committed by a justice of the peace in England for a felony committed contrary to an Irish act of parliament, in order to be transmitted to Ireland to be tried, the offense having been committed there.

On being brought before the king's bench by *habeas corpus*, Strange, for the prisoner, moved for his discharge, or for bail, on the ground that justices of the peace in England had no power over crimes committed in Ireland, which was a distinct kingdom; and that it was against the *habeas corpus* act to remove the prisoner to Ireland. But the court, upon the authority of the cases above cited, remanded the prisoner, observing that if he was not removed to Ireland in a reasonable time, application might be again made to the court for his discharge. See also *Mure v. Kaye*, 4 Taunt. 84; 1 Ch. Crim. L. 14, 46.

In the Case of *Washburn*, *supra*, the prisoner was detained in custody by virtue of a *mittimus* from the recorder of the city of Troy, under charge of a crime committed in Canada. Upon the prisoner being brought up by a writ of *habeas corpus*, Chancellor Kent said: "It is the law and usage of nations, rest-

ing on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed into a foreign and friendly jurisdiction. When a case of that kind occurs, it becomes the duty of the civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the government here to deliver him up, or for the foreign government to make the requisite application to the proper authorities here for his surrender."

If this principle be sound, as applied to the intercourse of independent foreign nations, in support of the right to reclaim fugitives from justice, it applies with far greater force and clearness in support of the express provision of the constitution, making the surrender of fugitives from justice obligatory upon every member of the confederacy. The denial of the power to arrest and detain an offender until the demand for his surrender be actually made would, it is manifest, render the provision of the constitution well nigh nugatory. If a person committing murder, robbery, or other high crime in one state may, by crossing a river, or an imaginary line, avoid arrest or detention until an executive requisition and order for his surrender may be obtained, the execution of the criminal law would be impotent indeed. Sound public policy, good faith, a fulfillment of the requirements of the constitution, all require that the arrest and detention be made of the offender, wherever he may be found, preparatory to a demand and surrender.

The exercise of the power has repeatedly been sanctioned by the American courts.

In *The People v. Schenck*, 2 Johns. 479, the prisoner having been indicted for stealing a gun, the jury found specially that he stole the gun in New Jersey and brought it into the state of New York. The court held that the act, as found, constituted no crime against the laws of New York; but they ordered the prisoner to be detained in prison for three weeks, and that notice be given to the executive of the state of New Jersey that the prisoner was detained on a charge of felony committed in this state.

In the *Matter of Goodhue*, in the mayor's court of the city of New York, 1 Wheel. Cr. Cas. 427, upon the return of the *habeas corpus*, it appeared that the prisoner was detained on three different commitments. The first commitment was under the statute for apprehending and punishing disorderly persons, under which he was committed to Bridewell for sixty days.

The second and third commitments stated that the prisoner is charged, on the oaths of R. W. and others, with having, at Lexington, in the state of Kentucky, fraudulently and by false pretenses, and exhibiting forged letters of credit, obtained divers sums of money of several individuals and mercantile houses with intent to defraud.

Riker, recorder, said: "It appears upon the oath of a witness, which oath is taken on competent authority, that the prisoner has committed a public offense against the laws of the state of Kentucky, and that he is a fugitive from the justice of that state. The constitution of the United States provides expressly for his arrest. The constitution is sacred, and we are bound by it. It is the supreme law of the land. It may be said that though it be true that on the demand of the executive power of Kentucky the prisoner may doubtless be given up, yet until he is demanded he is to be held at large. This can not be the meaning of the constitution. We may hold a fugitive to give a reasonable time to demand him. The decision of the court, therefore, is that Thomas F. Goodhue be remanded and detained in custody six weeks, to give time to the executive of Kentucky to demand him, under and in pursuance of the constitution of the United States."

The prisoner was subsequently brought before Chancellor Kent, by *habeas corpus*, on the fourteenth of October following, and the chancellor, considering that a sufficient time had elapsed since the commitment, in August preceding, for the executive of the state of Kentucky to have demanded the prisoner according to the constitution, and no such demand appearing to have been made, ordered his discharge: *In the Matter of Goodhue*, 1 City H. Rec. 153; S. C., 2 Johns. Ch. 198.

In *The Commonwealth v. Deacon*, 10 Serg. & R. 135; S. C., 2 Wheel. Cr. Cas. 17, Tilghman, C. J., though he denied the right in that case to hold the prisoner, on the ground that the government would not surrender him, held the following language: "I grant that when the executive has been in the habit of delivering up fugitives, or is obliged by treaty, the magistrates may issue warrants to arrest of their own accord (on proper evidence), in order the more effectually to accomplish the intent of the government, by preventing the escape of the criminal. On this principle, we arrest offenders who have fled from one of the United States to another, even before demand has been made by the executive of the state from which they fled." Here is a statement of the existence of the practice not only,

but a vindication of the principle upon which it rests; viz., to accomplish the intent of the government, and to carry into effect the provision of the constitution.

I am of opinion, both upon principle and authority, that a fugitive from justice, from either of the United States, may, under the provision of the constitution, be arrested and detained in this state preparatory to his surrender, before a requisition is actually made by the executive of the state where the crime is committed. It is an exercise of power essential to the full operation of the constitution, and has been sanctioned by a long and uniform course of practice.

I am aware that the power was denied in the case of *The People v. Wright*, 2 Cai. 213. But that case does not appear to have undergone mature deliberation, and must be considered as overruled by the late authorities.

Nor is the principle impugned by the fact that the legislatures of several of the states have made express provision by law for the arrest and detention of fugitives from justice prior to an executive requisition for their extradition. It amounts to no more than a regulation of the exercise of an existing right.

2. It is further objected, that the offense with which the prisoner stands charged is not a crime within the meaning of the constitution. Admitting the position taken by counsel in argument, that the offense specified does not constitute larceny at the common law, it is nevertheless certified by the governor of California to be grand larceny under the laws of that state. It is, moreover, an offense of a highly immoral character, and, as appears by the bill of indictment, which must be regarded as *prima facie* evidence of the fact, is a crime by the law of the state of California.

3. The original affidavit upon which the warrant issued was clearly defective, as it does not allege that any crime had been committed by the prisoner within the state of California, from which he is alleged to be a fugitive: *In the Matter of Heyward*, 1 Sandf. 701.

But inasmuch as it appears, by the subsequent affidavit and the evidence adduced upon the hearing, that the alleged crime was committed in California, that the defendant stands charged with the crime there, and is a fugitive from justice in that state, he is not entitled to be discharged, but must be continued in custody. Should a demand for his surrender not be made by

the executive of California within a reasonable time, the prisoner will be entitled to his discharge.

Ordered accordingly.

On the twenty-seventh of June, 1852, the prisoner was again brought before the chief justice upon a writ of *habeas corpus*, and it appearing to the satisfaction of the court that a sufficient time had elapsed since the commitment for a demand for the surrender of the prisoner as a fugitive to have been made by the executive of California, and no such requisition appearing to have been made of the executive of this state, it was ordered that the prisoner be discharged, and he was discharged accordingly.

PROCEEDINGS FOR ARREST AND SURRENDER IN ONE STATE OF FUGITIVES FROM JUSTICE IN ANOTHER—CONSTITUTIONAL AND STATUTORY PROVISIONS. The constitution of the United States, art. 4, sec. 2, provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This section, as first reported by the committee of detail to the federal convention, was as follows: "Any person charged with treason, felony, or high misdemeanor in any state, who shall flee from justice, and shall be found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offense;" 5 Elliott's Deb. 381; 2 Madison's Pap. 1240. When the article was afterwards taken up by the convention, the words "high misdemeanor" were struck out of the section and the words "other crime" inserted in their stead, "in order to comprehend all proper cases," as Mr. Madison says, "it being doubtful whether 'high misdemeanor' had not a technical meaning too limited;" 5 Elliott's Deb. 487; 3 Madison's Pap. 1447. Further changes were made in committee, and when finally adopted, the section read as above given. It may here be observed that the articles of confederation contained a clause similar to the one reported to the convention: "If any person guilty of or charged with treason, felony, or other high misdemeanor, in any state, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up, and removed to the state having jurisdiction of his offense;" Art. 4, sec. 2; and it is more than probable that this is the source of the present constitutional provision. The objects and reason of the section are thus clearly stated by Beasley, C. J., in *Matter of Voorhees*, 32 N. J. L. 141, 145: "The purpose, then, of this provision of the constitution was, as I conceive, twofold: first, to impose an absolute obligation on each state to surrender criminals fleeing from the justice of another state; and second, to define clearly the class of criminals so to be surrendered. The rule of international comity was defective in both particulars, and the design, consequently, was to create a substitute which should be without either defect."

It will be noticed that while the constitution provides who shall make the demand for the surrender of the fugitive from justice, it says nothing of whom the demand shall be made, nor of the manner in which the crime shall be charged.

Certain difficulties having arisen in this regard, congress in 1793 passed an act " respecting fugitives from justice and persons escaping from the service of their masters," the first two sections of which reproduced in the revised statutes of the United States are as follows: "Section 5278. Whenever the executive authority of any state or territory demands any person, as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory. Section 5279. Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the state or territory from which he has fled. And every person who by force sets at liberty or rescues the fugitive from such agent while so transporting him shall be fined not more than five hundred dollars, or imprisoned not more than one year."

In *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539, this act of 1793, especially that part of it relating to fugitives from service, came before the supreme court of the United States, and Mr. Justice Story said (p. 618) of the power of congress to pass such legislation: "No one has ever supposed that congress could constitutionally, by legislation, exercise powers or enact laws beyond the powers delegated to it by the constitution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end." And again he says (p. 620), speaking more particularly in reference to the extradition of fugitives: "From that time [1793] down to the present hour, not a doubt has been breathed upon the constitutionality of this part of the act; and every executive of the Union has constantly acted upon and admitted its validity." In *Matter of Romaine*, 23 Cal. 585, however, Mr. Justice Crocker, overlooking this decision, and reasoning from the fact that in article 4 of the constitution of the United States several important subjects are treated of, over some of which power is conferred upon congress, and over others not, comes to the conclusion that in relation to the latter congress has no power to legislate; but the provisions concerning such matters stand as solemn compacts between the states to be enforced by state legislation or judicial action; this clause, however, being a part of the supreme law of the land, is a part of the law of each state, and state officers, whose duty it is to adjudicate or execute the laws, are governed by it the same as by every other law in force; and a court of general original jurisdiction could apply the appropriate remedy and issue the necessary writs without special legislation.

It will also be observed that the constitutional provision is confined to

states, and does not include territories within its terms, while the act of congress applies alike to states and territories. That the act in its application to territories is constitutional, would seem to be unquestionable, under the power conferred upon congress in article 4, section 3, of the constitution, to make "all needful rules and regulations respecting the territory or other property belonging to the United States:" Spear on Extrad. 232; and see Pomeroy's Const. Law, sec. 494 et seq.; Story on the Const., sec. 1325 et seq. And Mr. Justice Story, in *Prigg v. Commonwealth of Pennsylvania*, *supra* (p. 622), also broadly asserts: "We hold the act to be clearly constitutional in all its leading provisions, and indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty upon the grounds already stated." The question was raised in *State v. Loper*, Ga. Dec., pt. 2, 33, but not decided, the court holding that a fugitive from justice from a territory might be arrested and detained under the law of nations and the common law of the land; and in *Matter of Romaine*, *supra*, Mr. Justice Crocker, observing that the word "territory" was omitted from the clause of the constitution, deemed it necessary to look elsewhere in cases of requisitions from territories, and held that this defect was remedied, not by the act of congress, but by a statute of California then existing. With reference to the District of Columbia, congress has passed a law declaring that "in all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the chief justice of the supreme court shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the district, in the same manner and under the same regulations as the executive authority of the several states are required to do by the provisions of sections 5278 and 5279 of the revised statutes:" U. S. R. S., Dist. Col., sec. 483; and according to the case of *In re Buell*, 3 Dill. 116, a criminal offender against the laws of the District of Columbia, if found beyond the district, may be brought back to it for trial.

The act of 1793 being therefore constitutional, it follows that no laws inconsistent therewith can be passed by the states: Hurd on Hab. Corp. 631; Spear on Extrad. 243; but the question has arisen whether all state legislation on the subject of interstate extradition is excluded. Judge Story, in *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539, 617, says: "In a general sense, this act may be truly said to cover the whole ground of the constitution, both as to fugitives from justice and fugitive slaves; that is, it covers both subjects in its enactments; not because it exhausts the remedies which may be applied by congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the objects of the constitution; but because it points out fully all the modes of attaining those objects which congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject, and by necessary implication prohibit it." In *Ex parte Smith*, 3 McLean, 121; S. C., 6 Law Rep. 57, it was said of state laws, making it the duty of executives to issue warrants to apprehend fugitives from justice when such fugitives were demanded, and the act of congress complied with, if they intended to impose more than a duty, subjecting the executives to impeachment in case of violation, they were unconstitutional; and in *Ex parte McKean*, 3 Hughes, 23, the following language is used by Hughes, J.: "The state of Virginia has adopted provisions similar to if not identical with those of the constitution and laws of the United States on this subject, and whether she had done so expressly or not, these latter

provisions are a part of her law and are obligatory upon her officers and courts. It has been held that the power of congress to legislate on this subject of the delivery of fugitives from one state into another is exclusive, and that its law is the paramount law of the subject." Citing *Prigg v. Commonwealth of Pennsylvania, supra*; *Matter of Martin*, 2 Paine, 348; *Jones v. Vanzandt*, 2 McLean, 611; *Ex parte Smith, supra*.

Notwithstanding the broad views expressed in these cases as to the exclusive nature of the legislation of congress on the subject of extradition of fugitive criminals, there can be no objection, in the nature of things, to state legislation simply auxiliary in its character: See Spear on Extrad. 252; Hurd on Habeas Corpus, 631. Thus in *Robinson v. Flanders*, 29 Ind. 10, it was held that as to what steps the governor shall take to secure the arrest of the person demanded, and how he shall satisfy himself of the identity of the person seized, the act of congress has not determined, but has left it for the states to provide such reasonable methods as will best secure the discharge of the obligation imposed by the constitution of the United States; a state statute, therefore, may require the officer making the arrest to take the prisoner before the nearest judge for identification; and a like ruling was made under a similar statute of Pennsylvania, in *Ex parte Butler*, 18 Alb. L. J. 369. The Ohio act of 1875 relating to fugitives from justice was held to be a valid enactment in *Ex parte Ammons*, 34 Ohio St. 518, in so far as it was in aid of the provisions of the constitution of the United States and the act of congress on that subject; thus the act might provide "proper and adequate means and facilities for the accomplishment of such extradition." Again, the constitution and law of congress apply only to fugitive criminals for whom a demand has been made by the executive authorities of the states and territories from which they have fled; and there is evidently nothing in either to prevent state laws providing for the arrest and detention, a preliminary examination of the accused, and the like: *Commonwealth v. Tracy*, 5 Met. 536; *Ex parte White*, 49 Cal. 433; *Ex parte Cubreth*, Id. 435; although in *Degant v. Michael*, 2 Ind. 396, the court expressed its belief that under *Prigg v. Commonwealth of Pennsylvania, supra*, such statutes were void. By the term "executive authority," as used in the act of congress, it was held in *Commonwealth v. Hall*, 9 Gray, 262, nothing more is intended than to prescribe the department of government, the executive as distinguished from the judicial and legislative, to which application should be made for the surrender of fugitives from justice; and if the executive authority is not vested in the governor alone, it is only necessary to call so much of the department into action as is requisite to carry the provisions of the act into effect; section 7, chapter 142, Mass. R. S. 1836, authorizing the governor alone to issue a warrant for the apprehension of a fugitive, is therefore in accordance with the act of congress.

EXECUTIVE DISCRETION IN CAUSING ARREST AND DELIVERY.—The law of congress provides that on demand made of the executive authority of any state or territory to which a fugitive from justice has fled, and the compliance with certain requirements, "it shall be the duty" of such executive authority to cause the arrest and delivery of the fugitive. It has never been authoritatively held that this law is anything more than declaratory. Thus in *Commonwealth of Kentucky v. Dennison*, 24 How. 66, 107, where it was sought to compel the performance of this duty by *mandamus*, Chief Justice Taney said: "The words 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United

States and the several states bear to each other, the court is of the opinion the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power." It follows from this that a writ of *certiorari* will likewise not be issued against a governor to compel the production of the papers on which he issued his warrant: *Matter of Leary*, 10 Ben. 197, 212; S. C., 6 Abb. N. C. 43, 58. See also *Taylor v. Taintor*, 16 Wall. 386, as recognizing the view that the executive has a discretion in this matter with which courts will not interfere. Chancellor Kent thus spoke of the law: "I am not aware that there has been any judicial opinion on this provision; and as it stands, I should apprehend that on demand being made, and the documents exhibited, no discretion remained with the executive of the state to which the fugitive had fled, and that it was his duty to cause the fugitive to be arrested and surrendered. But if the executive on whom the requisition is made should think proper to exercise his discretion and refuse to cause the fugitive to be arrested and surrendered (as has been done in one or more instances), I do not know of any power under the authority of the United States by which he could be coerced to perform the duty:" 2 Kent's Com., 12th ed., *32, note A. Certain decisions of state courts speak of the imperative duty of the executive upon whom the demand is made, to issue his warrant for the arrest and delivery of the fugitive, on the production of the requisite papers, and at least deny his right to inquire into the guilt or innocence of the accused: See *Johnston v. Riley*, 13 Ga. 97, 133; *People v. Pinkerton*, 17 Hun, 199. In the first of these cases a requisition had been made for the surrender of "Robert J. Williams," as a fugitive from justice. The governor of the state upon whom the demand was made issued his warrant for the arrest of "Robert J. Williams, alias Spencer Riley." Held, in an action for false imprisonment by the latter against the agent appointed to receive the fugitive, that the governor had no legal authority to insert the alias in the warrant, but should have been governed by the record produced: *Work v. Corrington*, 34 Ohio St. 64; S. C., 32 Am. Rep. 345. An executive, therefore, having a discretion as to issuing a warrant, has the power to revoke it when issued: *In re Carroll*, 11 Chic. L. N. 14; *Work v. Corrington*, 34 Ohio St. 64; S. C., 32 Am. Rep. 345; and this, whether issued by himself or his predecessor: *Work v. Corrington*, *supra*. If a fugitive has once been delivered up by the governor for the crime in question, has been allowed bail, forfeited his bond, and has again become a fugitive, it is also within the power of the governor to order a second arrest and surrender: *Matter of Hughes*, Phill. L. 57.

JURISDICTION OF COURTS TO INQUIRE INTO CAUSE OF DETENTION.—1. *In General.*—While courts have no power to control the executive discretion and compel the surrender of a fugitive from justice, yet where the executive has once acted, and has issued his warrant, the question may be investigated on *habeas corpus*, whether or not the prisoner is properly detained under the constitution and law of congress: *Ex parte Smith*, 3 McLean, 121; S. C., 6 Law Rep. 57; *Matter of Manchester*, 5 Cal. 237; *Matter of Briscoe*, 51 How. Pr. 422; *People v. Brady*, 56 N. Y. 182; *Jones v. Leonard*, 50 Iowa, 106; S. C., 32 Am. Rep. 116; *Mohr's Case*, 18 Cent. L. J. 252; S. C., 2 Ala. L. J. 457. This inquiry was held to be expressly authorized by section 7 of the Indiana

act of March 9, 1867, and not forbidden by the constitution or act of congress, in *Hartman v. Aveline*, 63 Ind. 344; S. C., 30 Am. Rep. 247. The power was however denied by Judge Ray of South Carolina, in the early case of *Ex parte Willard and Wife*, cited Serg. Const. L. 395; but it is needless to say that his decision is not in accordance with authority or long-established practice.

2. *Jurisdiction whether Concurrent in United States and State Courts.*—A person arrested as a fugitive from justice from one state under a warrant issued by the governor of another state is undoubtedly "in custody under or by color of the authority of the United States," or "in custody for an act done or omitted in pursuance of a law of the United States," and therefore the national courts, under section 753, United States revised statutes, have jurisdiction by *habeas corpus* to inquire into the detention: *Ex parte Smith*, 3 McLean, 121; S. C., 6 Law Rep. 57; *Matter of Leary*, 10 Ben. 197; S. C., 6 Abb. N. C. 43; *Matter of Titus*, 8 Id. 411; *Ex parte McKean*, 3 Hughes, 23; *In re Doo Woon*, 18 Fed. Rep. 898; S. C., 1 West Coast Rep. 333; and this, although a proceeding by *certiorari* is pending in a state court at the suit of the fugitive, for the review of a decision of an inferior court dismissing a writ of *habeas corpus* issued by him: *Matter of Leary, supra*. But the jurisdiction is not exclusive: the arrest is made by state agency and state officers, and state courts and judges have also jurisdiction in the matter. This was so held by the supreme court of the United States in the recent case of *Robb v. Connolly*, 4 Sup. Ct. Rep. 544, affirming the judgment of the supreme court of California in *In re Robb*, 1 West Coast Rep. 255; S. C., 1 Pac. Rep. 881, and overruling the case as it came before the circuit court of the United States in *In re Robb*, 19 Fed. Rep. 26; S. C., 1 West Coast Rep. 439, in which latter instance the conclusion was based upon *Ableman v. Booth*, and *United States v. Booth*, 21 How. 506; and *Tarble's Case*, 13 Wall. 397.

Mr. Justice Harlan, in delivering the opinion of the court, says: "It is true that the executive authority of the state in which the fugitive has taken refuge is under a duty imposed by the constitution and laws of the United States to cause his surrender upon proper demand by the executive authority of the state from which he has fled. It is equally true that the authority of the agent of the demanding state to bring the fugitive within its territorial limits is expressly conferred by the statutes of the United States, and therefore, while so transporting him, he is, in a certain sense, in the exercise of an authority derived from the United States. But these circumstances do not constitute him an officer of the United States within the meaning of former decisions. He is not appointed by the United States, and owes no duty to the national government, for a violation of which he may be punished by its tribunals or removed from office. His authority, in the first instance, comes from the state in which the fugitive stands charged with crime. He is, in every substantial sense, her agent, as well in receiving custody of the fugitive as in transporting him to the state under whose commission he is acting. What he does in execution of that authority is to the end that the violation of the laws of his state may be punished. The fugitive is arrested and transported for an offense against her laws, not for an offense against the United States. * * * Subject, then, to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers of the general government acting under its laws, are so held in conformity with law, the states have the right by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective

territorial limits, is restrained of his liberty, and to discharge him if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the constitution or the laws of the United States." See also, holding the same view, *Mohr's Case (Ex parte State of Pennsylvania)*, 18 Cent. L. J. 252; S. C., 2 Ala. L. J. 457, decided by the supreme court of Alabama; and an article by Mr. Spear in 29 Alb. L. J. 206; but see 2 Kent's Com., 12th ed., *32, note h.

GUILT OR INNOCENCE OF FUGITIVE, WHETHER INQUIRED INTO ON HABEAS CORPUS.—It is not every matter connected with the arrest and surrender of fugitives from justice that will be inquired into by the courts on *habeas corpus*. While there must be a proper charge of crime, it is settled that the guilt or innocence of the prisoner will not be investigated: *Matter of Clark*, 9 Wend. 212; *State v. Schlemm*, 4 Harr. (Del.) 577, 578; *People v. Brady*, 56 N. Y. 182, 187; *Tullis v. Fleming*, 69 Ind. 15; *Matter of Voorhees*, 32 N. J. L. 141, 150; *Ex parte Swearingen*, 13 S. C. 74, 78; *In re Greenough*, 31 Vt. 279, 288; *Mohr's Case (Ex parte State of Pennsylvania)*, 18 Cent. L. J. 252; S. C., 2 Ala. L. J. 457; but where a person is arrested as a fugitive from justice before any demand is made for his arrest and surrender, the question is a different one, and it is then proper, for obvious reasons, to ascertain whether a crime has been committed under the laws of another state: See *State v. Busine*, 4 Harr. (Del.) 572, 576; *State v. Schelmn*, Id. 577, 578. If the copy of the indictment accompanying a requisition contains a charge of crime, that is all that is necessary, and the tribunals of the state in which the criminal is found will not consider or pass upon the sufficiency of the indictment as a matter of technical pleading: *Matter of Voorhees, supra*; *Davis' Case*, 122 Mass. 324. In *Ex parte Swearingen, supra*, where it was objected that the person originating the prosecution in Georgia was not a citizen of that state, the supreme court of South Carolina said: "It is quite sufficient to say that we are not at liberty to consider such a question. The authorities of the state of Georgia have undoubtedly recognized the fact that a prosecution has been lawfully commenced in that state, and it is not for us to question it. Whether the charge has been made in proper legal form, or whether it can be sustained by legal evidence, are questions which belong exclusively to the tribunals of the state where the crime is alleged to have been committed, as they alone have jurisdiction to determine whether the laws of such state have been violated. Even, however, were the point raised a matter within our jurisdiction, we are altogether unable to discover any valid reason why a citizen of South Carolina may not commence a prosecution in the state of Georgia for an offense committed within the territorial limits of that state." A distinction was suggested, however, in *In re Greenough, supra*, between charges made by affidavits and charges by indictments; Bennett, J., says: "The court, upon the *habeas corpus*, can not pronounce upon the guilt or innocence of the alleged fugitive. That must be left to the courts of that state where the crime is alleged to have been committed. If the charge is by way of affidavit against the alleged fugitive, and it clearly appears from the whole facts stated in the affidavit taken together that no crime had been committed, it might with some show of reason be claimed that the subject-matter was not within the provisions of the constitution and act of congress, and therefore as to the jurisdiction of the warrant, the whole matter would be *non coram judice*. But that is far from being this case. Here the charge against the alleged fugitive is by a bill of indictment found by a grand jury, and whether the bill charges an indictable offense under the statute of Illinois should be left to the determination of the courts of that state." And see the remarks of Andrews, J., in *People v. Brady*, 56 N. Y. 182, 190, quoted post.

CONSTITUTION EMBRACES WHAT OFFENSES.—It is settled that the words “treason, felony, or other crime,” contained in the provision of the constitution, embrace every act forbidden and made punishable as a crime by the law of the state or territory making the demand, whether made so by common law or by statute: *Commonwealth of Kentucky v. Dennison*, 24 How. 66, 99; *Matter of Clark*, 9 Wend. 212; *Commonwealth v. Green*, 17 Mass. 515, 547; *Brown's Case*, 112 Id. 409; S. C., 17 Am. Rep. 114; *People v. Brady*, 56 N. Y. 182, 188; *People v. Donohue*, 84 Id. 438; *In re Hooper*, 52 Wis. 699; the principal case has been cited to this proposition in *Robinson v. Flanders*, 29 Ind. 10; *Matter of Voorhees*, 32 N. J. L. 141; *In re Greenough*, 31 Vt. 279. And the clause includes crimes made so by statutes passed after the adoption of the constitution: *Matter of Hughes*, Phill. L. 57; *Matter of Leary*, 10 Ben. 197; S. C., 6 Abb. N. C. 43. Whether the term “crime” includes mere misdemeanors would seem to be doubtful: See *Matter of Voorhees*, 32 N. J. L. 141, 148. It was held, however, in *Morton v. Skinner*, 48 Ind. 123, that a misdemeanor punishable by a fine not exceeding five thousand dollars was within the meaning of the word as used in the constitution: and see *People v. Brady*, 56 N. Y. 182, 188.

WHO ARE FUGITIVES FROM JUSTICE.—A fugitive from justice is defined to be “a person who commits a crime within a state, and withdraws himself from such jurisdiction without awaiting to abide the consequences of such act:” *Matter of Voorhees*, 23 N. J. L. 141, 150; and again, in *Hibler v. State*, 43 Tex. 197, 201, it was said that “a person who commits a crime in one state, for which he is indicted, and departs therefrom, and is found in another state, may well be regarded as a fugitive from justice;” and also in *People v. Pinerton*, 17 Hun, 199, that “the charge that he committed a crime in that state, coupled with the fact that he is found in this state, is conclusive upon the question whether he is a fugitive from justice.” One who goes into a state, commits a crime, and then returns home, is as much a fugitive from justice as though he had committed a crime in the state in which he resided, and then fled to some other state: *Kingsbury's Case*, 106 Mass. 223; *Ex parte Swearingen*, 13 S. C. 74; and see *Matter of Adams*, 7 Law Rep. 386, 389. An interesting question in this connection is whether the constitution embraces “fugitives by construction,” or those who while in one state, and remaining there, commit acts which result in crimes by the laws of other states, as, for example, obtaining goods by false pretenses. This question is of course based upon the theory that the crime is committed in that jurisdiction where the act takes effect or produces the result, and not where the offender was at the time of its execution. The cases which have arisen answer this question in the negative: *Jones v. Leonard*, 50 Iowa, 106; S. C., 32 Am. Rep. 116; *Matter of Adams*, 7 Law Rep. 386; *Mohr's Case*, 18 Cent. L. J. 252; S. C., 2 Ala. L. J. 457; *Wilcox v. Nolze*, 34 Ohio St. 520. The court in the latter case, in construing the words “who shall flee” in the constitution, says: “These words, taken, as they must be, in their natural and obvious sense, do not include a case of constructive presence in the demanding state and constructive flight therefrom, but relate only to a case where the accused is actually present in the demanding state at the time he commits the act of which complaint is made.” If the prisoner is not really a fugitive from justice, and should undertake to set that up as a ground for relief on habeas corpus, it can not be done by a mere denial, but by the statement of such facts as would show that the presumption upon which the governor had acted was unfounded in fact: *Hibler v. State*, 43 Tex. 197.

EXTRADITION PAPERS.—1. *Papers Requisite for the Issuing of Warrants, and their Authentication.*—An authenticated copy of an indictment found, or

affidavit made, charging the person demanded with the commission of a crime, must be produced before a governor is authorized to issue his warrant for the apprehension of the fugitive: See *Matter of Rutter*, 7 Abb. Pr., N. S., 67; *Ex parte Pfitzer*, 28 Ind. 450; *Botts v. Williams*, 17 B. Mon. 687; but an authenticated copy of an information filed is a sufficient compliance with the act of congress: *In re Hooper*, 52 Wis. 699. A requisition alone is not sufficient: *Matter of Rutter*, 7 Abb. Pr., N. S., 67; see, however, *Hibler v. State*, 43 Tex. 197. But it is not necessary that a warrant should have been issued for the fugitive in the state from which he fled; it is the indictment or affidavit, and not the issuing of a warrant, that constitutes the charge against a fugitive upon which his return can be required: *Tullis v. Fleming*, 69 Ind. 15. The indictment or affidavit must be certified as authentic by the governor or chief magistrate of the state or territory from whence the person charged has fled; therefore an affidavit certified as authentic by a secretary of state is insufficient: *Solomon's Case*, 1 Abb. Pr., N. S., 347. The certificate of authentication is not required to be in any particular form, and where the language of the demanding governor in the requisition shows the copy of the indictment annexed thereto to be authentic, it is sufficient: *Ex parte Sheldon*, 34 Ohio St. 319; *Matter of Manchester*, 5 Cal. 237; and see *Hibler v. State*, 43 Tex. 197.

2. *Sufficiency of Indictments.*—The courts seem to be justly unwilling to discharge arrested fugitives for defects in duly authenticated indictments. Thus in *Davis' Case*, 122 Mass. 324, 329, Gray, C. J., said: "When an indictment appears to have been returned by a grand jury, and is certified as authentic by the governor of the other state, and substantially charges a crime, this court can not, on *habeas corpus*, discharge the prisoner because of formal defects in the indictment; but the sufficiency of the charge as a matter of technical pleading is to be tried and determined in the state in which the indictment is found." The same view was taken in *Matter of Voorhees*, 32 N. J. L. 141, 150, by Beasley, C. J.; and by Bennett, J., in *In re Greenough*, 31 Vt. 279, 288, quoted above. And in *Hibler v. State*, 43 Tex. 197, it was held, where the copy of an indictment was certified as authentic, the absence of a seal to the certificate of the clerk of the court in which the indictment purported to have been found, or of a file-mark on the indictment, would not be noticed on *habeas corpus*.

3. *Sufficiency of Affidavits.*—An affidavit accompanying the demand must charge that a crime has been committed by the accused in the state or territory from which he has fled: *Ex parte Smith*, 3 McLean, 121; S. C., 6 Law Rep. 57; *Matter of Heyward*, 1 Sandf. 701; *People v. Brady*, 56 N. Y. 182; and such affidavit must not be on belief, or embody a hearsay statement, but must distinctly charge the offense: *Ex parte Smith*, 3 McLean, 121; S. C., 6 Law Rep. 57; *Matter of Leland*, 7 Abb. Pr., N. S., 64; *Matter of Rutter*, Id. 67; and if the affidavit is thus defective, the court will not ordinarily remand the prisoner until the proper documents can be prepared: *Matter of Leland*; *Matter of Rutter*. In *Matter of Manchester*, 5 Cal. 237, it was held unnecessary that the affidavit should set forth the crime with all the legal exactness required to be observed in an indictment; it is enough that it distinctly charge the commission of an offense; but it is well to notice in this connection some pertinent observations of Andrews, J., in *People v. Brady*, 56 N. Y. 182, 190; he says: "It can not be held that any less degree of certainty is admissible in an affidavit charging the conspiracy than is required in an indictment for the same offense. If any distinction exists in this respect, the affidavit should be more full and specific. It is usually the *ex parte* state-

ment of the accuser. An indictment is found by a body standing indifferent between the parties, and charged upon oath to inquire of offenses, and which is supposed to act upon competent proof in finding the bill;" and see the remarks of Bennett, J., in *In re Greenough*, 31 Vt. 279, 288, quoted *supra*. It is necessary also that the affidavit allege that the accused has fled from justice: *Matter of Heyward*, 1 Sandf. 701; *Ex parte Romane*, 1 Utah, 28, citing the principal case to this point; *contra*: *Ex parte Swearingen*, 13 S. C. 74, Willard, J., dissenting. In *Matter of Manchester*, 5 Cal. 237, where it was objected that the affidavit did not charge in distinct words that the prisoner was a fugitive from justice, it was held that the allegation that he committed the crime, and then secretly fled, was sufficient from which to deduce the conclusion.

4. *Sufficiency of Executive Warrants.*—Concerning the sufficiency of executive warrants, there seems to be some apparent if not real conflict among the cases, arising no doubt in some instances from the fact that sometimes the warrant is accompanied by a copy of the indictment or affidavit upon which it is issued, and sometimes not. In the first place, it is established by authority and practice that a copy of the indictment or affidavit need not accompany the warrant: *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders*, 29 Id. 10; but in such cases the warrant should evidently recite at least that the requisition upon which it was issued was accompanied by a duly authenticated copy of an indictment or affidavit: See the cases last cited; *Ex parte Thornton*, 9 Tex. 635; *In re Doo Woon*, 18 Fed. Rep. 898; S. C., 1 West Coast Rep. 333. When these requisites have been complied with, it has been held that the warrant is conclusive evidence that the person named therein stands charged with crime in the other state: *Matter of Leary*, 10 Ben. 197; and see *State v. Schlemm*, 4 Harr. (Del.) 577. Certain other cases recognize the right to examine into the warrant to see if a crime has been properly charged: *People v. Donohue*, 84 N. Y. 438; *People v. Pinkerton*, 77 Id. 245, affirming 17 Hun, 199. *Kingsbury's Case*, 106 Mass. 223, holds that the issue of a warrant by the governor, under the general statutes 1860, c. 177, sec. 3, is conclusive that the demand is conformable to law, and ought to be complied with, unless there is some defect apparent on the record; and see *Davis' Case*, 122 Id. 324; *Commonwealth v. Hall*, 9 Gray, 262. In *Brown's Case*, 112 Mass. 409; S. C., 17 Am. Rep. 114, where it was objected that the offense was not sufficiently set forth in the warrant, it was held that the question was not whether the statement therein would be sufficient in an indictment to put the prisoner upon trial in the state from which he fled, but whether it showed that he has been charged with a crime against the law of that state; and for that purpose a general description in the warrant was held sufficient. See further, as to the necessity of charging the offense in the warrant, *Ex parte Buller*, 18 Alb. L. J. 369; *Matter of Romaine*, 23 Cal. 585. In *Ex parte Cubreth*, 49 Id. 435, it is held that the proceedings under the statute in relation to the arrest and detention of fugitives from justice are required by section 1550 of the California penal code to be similar in all respects to those instituted against persons charged with public offenses committed within the limits of the state, and it is indispensable to their validity in either case that the warrant should specify the offense alleged to have been committed by the accused. Warrants were held to be insufficient in *In re Jackson*, 2 Flipp. 183; S. C., 12 Am. Law Rev. 602; *Matter of Romaine*, 23 Cal. 585, because they did not state either satisfactorily or at all that the accused was a fugitive from justice. Warrants are required in Missouri to be under the great seal of the state, and if the impression of the seal is unintelligible, the warrant is void: *Vallad v. Sheriff*, 2 Mo. 26. A mandate

authorizing the "delivery" of the fugitive to an agent is sufficient to authorize his arrest: *Ex parte Swearingen*, 13 S. C. 74; as is a warrant authorizing him to "take and receive into custody" the fugitive. As to an agent being protected under his precept, see *Pettus v. State*, 42 Ga. 358; *Commonwealth v. Hall*, 9 Gray, 262.

ARREST BEFORE DEMAND MADE.—It is perfectly well settled that a fugitive from justice may be arrested before a demand, and detained in custody a reasonable time to give the executive of the state from which he fled an opportunity to issue a requisition; *Matter of Goodhue*, 1 Wheal. Cr. Cas. 427; *People v. Goodhue*, 2 Johns. Ch. 193; S. C., 1 City H. Rec. 153; *People v. Schenck*, 2 Johns. 479; *Commonwealth v. Deacon*, 10 Sarg. & R. 125, 135; S. C., 2 Wheal. Cr. Cas. 17; *State v. Howell*, R. M. Charl. 120; *State v. Loper*, Ga. Dec., pt. 2, 33; *State v. Basine*, 4 Harr. (Del.) 572; *Ex parte Romanes*, 1 Utah, 23; *Ex parte Donaghay*, 2 Pittsb. 166; the two latter cases citing the principal case to this point; see, however, *People v. Wright*, 2 Cal. 213. This is also true in case of foreign extradition: See *In re Washburn*, 4 Johns. Ch. 106; S. C., 8 Am. Dec. 548. But there must be evidence, as a prerequisite, that a crime has been committed in the other state, with which the prisoner is charged: *Ex parte Donaghay*, 2 Pittsb. 166, 169; *Ex parte McKean*, 3 Hughes, 23. That the person must be charged with crime in another state is in some instances required by statute: *State v. Hufford*, 28 Iowa, 391; *Ex parte Lorraine*, 16 Nev. 63; *State v. Swoope*, 72 Mo. 399; and to give a magistrate jurisdiction under chapter 61 of the Indiana revised statutes, p. 1030, authorizing the commitment of fugitives from justice before demand made, it should be shown by affidavit that the person sought to be arrested is a fugitive from justice: *Degant v. Michael*, 2 Ind. 396. And see further, on the necessity of it appearing that the person is a fugitive from justice, *Ex parte Donaghay*, 2 Pittsb. 166, 169. Under sections 1548 et seq. of the California penal code, a prosecution must have been commenced and pending in another state before the criminal can be arrested and detained previous to a demand: *Ex parte White*, 49 Cal. 433; and reading sections 1550 and 861 of the penal code together, it would seem that where a person is arrested as a fugitive from justice before a demand made, he is entitled to his discharge if his examination is not brought on before the magistrate within six days: *Ex parte Rosenblat*, 51 Id. 285.

CHARGE EXISTING AGAINST FUGITIVE IN STATE WHERE FOUND.—Where a requisition finds the fugitive from justice detained in another state, to there answer a criminal charge, he must plainly make satisfaction to the laws of the latter state before he can be permitted to be extradited: See *Matter of Troutman*, 24 N. J. L. 634. This rule is held to apply equally where the requisition finds him detained under civil process: *Id.*; *Matter of Briscoe*, 51 How. Pr. 422; but in *Ex parte Rosenblat*, 51 Cal. 285, where a person was arrested as a fugitive from justice from another state, and before a warrant for his extradition was issued by the governor, an order for his arrest was made in a civil suit, it was held that he was not liable to be detained on the latter, but must be delivered up to be extradited. If, however, the state does deliver up the criminal without first exacting satisfaction, this constitutes a good defense to an action against bail for his non-appearance: *State v. Allen*, 2 Humph. 258; but where the state does not participate in the surrender, the rule is different: *Taintor v. Taylor*, 36 Conn. 242; S. C., 4 Am. Rep. 58, affirmed in the supreme court of the United States in *Taylor v. Taintor*, 16 Wall. 366.

FUGITIVE, WHETHER LIABLE FOR OTHER OFFENSES WHEN EXTRADITED.—It is held that a fugitive, extradited from one state to another on the charge of a specific crime, may be tried in the latter state for a different offense: *Ham v. State*, 4 Tex. App. 645; *Commonwealth v. Noyes*, 17 Alb. L. J. 407; S. C., 11 Chic. L. N. 9; but on the other hand, this proposition is denied: *Matter of Cannon*, 47 Mich. 481. Where one has been extradited, tried, and acquitted, it has also been held that he might then be arrested in a civil suit; but it seems that had the criminal proceeding been a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civiliter*, he would be discharged on *Habeas corpus*: *Williams v. Bacon*, 10 Wend. 636; *Commonwealth v. Daniel*, 4 Pa. L. J. Rep. 49. But in *Crompton v. Wilder*, 7 Am. Law Rec. 212; S. C., 29 Alb. L. J. 232, it was held that where parties procure the extradition process, and have a fugitive brought into another state on a criminal charge, such parties have no right to institute a civil suit against the fugitive, having its origin in the alleged crime, until he has had a reasonable time to return.

ARREST, WHETHER MUST BE LEGAL TO DETAIN FUGITIVE.—It is the accepted doctrine that a fugitive from justice may be detained for prosecution in the state from whence he fled, notwithstanding the means employed to bring him within the reach of the process of the latter state be wholly without legal authority: *In re Miles*, 52 Vt. 609; *Dow's Case*, 18 Pa. St. 37; *Commonwealth v. Noyes*, 17 Alb. L. J. 407; S. C., 11 Chic. L. N. 9. This is the doctrine applied to cases in general: 1 Bish. Cr. L., sec. 135; *Ex parte Scott*, 4 Man. & R. 361; S. C., 9 Barn. & Cress. 446; *State v. Smith*, 1 Bailey, 283; *State v. Brewster*, 7 Vt. 118; *State v. Ross*, 21 Iowa, 467. Although in such instances there may be breach of international duty, for which reparation can be demanded; and besides, the fugitive may have a right of action against those who illegally arrest him.

TRENTON MUTUAL LIFE AND FIRE INS. CO. v.
PERRINE.

[3 ZABRISKIE, 402.]

CORPORATION AGGREGATE MAY MAINTAIN ACTION FOR LIBEL for words published of it in the way of its trade or business, or of its property and concerns, or of its officers, servants, or members, by reason of which special damage is sustained by the corporation.

SPECIAL DAMAGE FOR LOSS OF BUSINESS THROUGH LIBEL MAY BE ASSIGNED GENERALLY, without stating the names of customers lost, where the individuals may be supposed to be unknown to the plaintiff, or where it is impossible to specify them, or where they are so numerous as to excuse a specific description.

LIBEL. The declaration alleged that the plaintiffs, a corporation, were in high repute and credit, and were doing a large, profitable, and increasing business in insuring lives and property; and that the defendant, well knowing the premises, but with intent to injure the plaintiffs in their business, published in a certain newspaper, of and concerning the company in their

business, and of and concerning the directors, president, vice-president, and secretary of the company, and of and concerning the conduct and management of the property and concerns of the company, a certain false, malicious, and defamatory article, set forth in the declaration, meaning to insinuate that the officers and directors had acted fraudulently in managing and conducting the property and concerns of the company, and had thereby swindled the public. The assignment of special damage appears in the opinion. The defendant demurred to the declaration.

C. S. Green and Vroom, for the plaintiffs.

W. Halsted and W. L. Dayton, for the defendant.

By Court, GREEN, C. J. The first and most material question raised by the demurrer in this case is, whether an action for a libel may be maintained by a corporation aggregate. The question is one, so far as I am aware, of first impression. No case was cited on the argument, nor have my subsequent researches led to one in which the point has been expressly decided. There is no precedent to be found in the books of a declaration in such an action. This fact, in itself, creates a strong presumption, though by no means conclusive, against the right of action. The weight to be attached to the mere absence of all precedent will, however, be materially diminished, when it is remembered that the great body of the existing law in regard to corporations is the growth of the present century; that within the last fifty years it was first decided in Westminster hall that a corporation aggregate was liable *civiter* for its torts; and at a period still more recent, it was there first expressly adjudged that a corporation, like an individual, is liable to indictment. Perhaps a stronger presumption against the right of a corporation to maintain an action for libel may be found in the fact that the prevailing sentiment of the profession is against it. All experience teaches that there are few more reliable tests of sound legal principle or correct practice than the prevailing sentiment of an intelligent bar. These circumstances are grounds for caution in arriving at a different conclusion, though they certainly afford no reason for hesitating to tread wherever sound principles may point the way, however new or untrodden the path.

If it be asked why, upon principle, an action may not be maintained by a corporation for libel, it will be difficult to find a satisfactory reply. It can not be denied that a corporation may have a character for stability, soundness, and fair dealing

in the way of its trade or business; that this character is as essential—nay, more so—to its prosperity and success than that of a private individual; that banks, insurance companies, and money corporations generally, whose operations enter largely into the business of every community, depend mainly upon their reputation in the community for their success, and often for their very existence. Nor can it be denied that the character of corporations is more easily and more deeply affected by false and malicious allegations than that of private individuals; nor that the business of a corporation is more prejudiced by an evil name, by distrust of its responsibility, or of the character of its officers, than that of an individual. If, then, the reputation of a corporation and that of its officers be essential to its prosperity, if it may suffer pecuniary loss, and even the utter destruction of its pecuniary interests, from false and malicious representations, why should it not be entitled to pecuniary redress? Wherever the common law gives a right or prohibits an injury, it also gives a remedy by action: 3 Bla. Com. 23.

And in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages: 1 Com. Dig. 272, Action upon the Case, A.

And this general rule, says Starkie, embraces all cases where any special damage is immediately occasioned by a false communication of noxious tendency: 1 Stark. on Slan., 2d ed., 2.

It may be admitted, without prejudice to the present inquiry, that no words spoken or written of a corporation are in themselves actionable, but that the corporation must always show special damage in order to recover. And the reason for the distinction may be found in the fact that a corporation has not, like an individual, any character to be affected by the libel, independent of its trade or business. It has no individual personal character, in which it can suffer an injury independent of its pecuniary affairs; and therefore, in an action for libel which affects its trade or business, the corporation must show that the words, not being in themselves actionable, have occasioned a special pecuniary loss or damage.

This consideration will relieve the question of another objection, which was urged with much zeal upon the argument, viz., that false and malicious words spoken or written of a corporation do not fall within any approved definition of libel or slander. By these, libel is defined to consist of personal imputations upon private men or magistrates, living or dead. For example, a

libel is defined to be "any writing, picture, or other sign tending, without lawful excuse, to injure the character of individuals." Cooke on Def. 2.

It must be admitted that corporations do not fall within the scope of these definitions. But it is also true that the definitions are equally inapplicable to the subject of numerous actions brought by individuals, which are included under the general denomination of actions for slander. Thus an action may be maintained for slander of title of real or personal estate, which contains no personal imputation, and does not affect the character of either individuals or magistrates, living or dead: *Gerrard v. Dickenson*, Cro. Eliz. 196; 1 Stark. on Slan., 2d ed., 191.

So it is libelous for one newspaper to publish of another newspaper that it is low in circulation, inasmuch as it affects the sale and profits to be made by advertising: *Heriot v. Stuart*, 1 Esp. 437.

So words are actionable when they throw discredit on a particular commodity in which a party deals, as to say of a trader, "that he hath nothing but rotten goods in his shop:" *Burnet v. Wells*, 12 Mod. 420; *Ireland v. Lockwood*, Cro. Car. 570. Or to charge a bookseller falsely with having published an absurd poem: *Tabart v. Tipper*, 1 Camp. 350. Or to say of a ship that she is broken and unfit to proceed to sea: 2 Ch. Pl., 7th ed., 641 k. Or to publish of a stage-coach, that it is dangerous to travel in: Cooke on Def. 314.

The very recent case of *Swan v. Tappan*, 5 Cush. 110, was an action by an author for a publication disparaging the character of school-books in which the plaintiff had a copyright. The action failed, for a defect in the declaration, but no doubt was expressed that, in principle, the action was sustainable. These instances are cited from a numerous and familiar class of cases, to be found in the books of actions, denominated actions for slander or libel, but which are in truth special actions on the case for the recovery of damages actually sustained by the plaintiff in consequence of the false and malicious representations of the defendant, affecting the plaintiff's property. They do not fall within any recognized definition of slander or libel; they contain no personal imputation. They do not affect the character either of individuals or magistrates; but, like any other tort, they occasion damage to the property of the plaintiff, and therefore they are actionable. In all these cases the ground of recovery is special damage actually sustained in consequence of the slander; and it may be affirmed, as a general principle, that

when damages have actually been sustained, the party aggrieved may maintain an action for the malicious publication of any untruth: *Sheppard v. Wakeman*, 1 Lev. 58; *Moore v. Meagher*, 1 Taunt. 43, *per Heath*, J.; 2 Ch. Pl., 7th ed., 641 g, note.

It may be collected, says Starkie, from the definitions of text-writers and the decisions of our courts, that, in general, an action lies to recover damages in respect of any false and malicious communication, whether oral or written, to the damage of another, in law or in fact: 1 Stark. on Slan., 2d ed., 2.

In most of the cases cited, as has been said, the words relate solely to the property, and not to the character, of the plaintiff. In others, however, the personal character of the plaintiff is involved; and this constitutes the criterion whether the action can be maintained without special damage. Thus, in *Ingram v. Lawson*, 6 Bing. N. C. 212, which was an action by the owner and master of a vessel, which he had advertised for a voyage to the East Indies, for an alleged libelous publication in a newspaper, charging that the ship was not seaworthy, Bosanquet, J., said: "The substantial question for the court is, whether the publication was a libel on the plaintiff, in his business of a master mariner and ship owner, or merely amounted to a disparagement of the qualities of his ship. If it were merely the latter, then, as there is no allegation of special damage, nothing can be recovered. But if it was a libel on the plaintiff in his business, then whether malice were proved or not, the plaintiff would be entitled to recover damages for statements injurious to his character, and which, from their nature, must be prejudicial to his business."

Where the publication merely disparages the property, without affecting the individual character, as in the case of a libel upon a stage-coach, or upon a school-book, it is not easy to perceive why the action should not be maintained by a corporation as well as by an individual. The *gravamen* of the action is the injury done to the property of the plaintiff by the wrongful act of the defendant. No one but the owner of the property can maintain the action; and a corporation being the owner, the injury to them is just as great, and it would seem upon principle that the right is just as clear, in their behalf as it would be in case of an individual. Certainly, in case of an injury to their property by any other tortious act, the corporation would have a clear right of action, and why not in case of an injury inflicted by the publication of malicious falsehood? The principle upon which this right of action vests in the corporation has

been judicially recognized in several cases. Thus it has been held, notwithstanding the general rule, that two can not unite in an action for slander; that a joint action may be maintained by two partners for defamatory words respecting their trade, if special damages are claimed by reason of the slander: *Cook v. Batchellor*, 3 Bos. & Pul. 150; *Coryton v. Lithebye*, 2 Saund. 115.

In the case of *Williams, Chairman of The Hope Assurance Co., v. Beaumont*, 10 Bing. 260, the point directly before the court was, whether, under a particular act of parliament, the action might be maintained by the chairman in behalf of the association, which was unincorporated. But that question necessarily involved the right of the associates themselves to maintain the action. Hence Tindal, C. J., says: "I think this action is maintainable in the name of the chairman. The libel complained of is not a libel on the members of the company in their individual capacity, but a libel on the partnership in the way of its business, by attacking the mode in which that business is conducted. * * * Now, it is clear, from established cases, that for such a libel an action lies on behalf of a partnership. And the only question is, whether, under the terms of this act of parliament, the partnership attacked may sue in the name of its chairman." And Bosanquet, J., said: "Is this, then, a demand accruing to the Hope Assurance Company? The libel is clearly a libel on the company, in respect of the mode in which the business is carried on; for any injury produced by such a libel the company would have a claim on the offender, and the intention of the act was to substitute the chairman for the company in the assertion of any claim on the part of the company. * * * The damages are not to be recovered for what the learned sergeant has called a sentimental injury, but for an injury to the trade and business of the company; and the proceeds will go to the company, as it exists at the time of the recovery." This case, it is conceived, is strongly and directly in point in support of the principle upon which the present action is founded.

I am of opinion that, upon principle, an action may be maintained by a corporation aggregate for words falsely and maliciously spoken or written of the company in the way of its trade or business, or of the property and concerns of the company, or of the officers, servants, or members of the company, by reason of which special damage is sustained by the corporation.

The tendency of modern adjudications has been, as far as

practicable, to treat corporations as natural persons. They are now held liable as individuals, civilly and criminally, for torts committed by their agents or servants, while they are held amenable to the law for all injuries inflicted by their wrongful acts. They should, upon principles of even-handed justice, be held entitled to its protection for all injuries suffered by them at the hands of others.

This conclusion is sustained by the well-settled general principle that corporations may sustain actions for all injuries done to the body corporate. And if an injury be done to one of the members, by which the body at large is put to any damage, it may sue on that account. 1 Kyd on Corp. 190; Angell & Ames on Corp., 4th ed., sec. 370.

And this authority furnishes a decisive answer to another objection that was urged upon the argument, viz., that the declaration is for a libel upon the officers and members of the company, and that the action should have been brought by them individually. But the authority is express, that if the corporation be put to damage by an injury to one of the members, the corporation may sue on that account, precisely as an individual may sue for damages sustained by him, by reason of an injury inflicted on his servant. It may be further answered to the objection that the words may not be actionable in themselves, and may in no wise affect the business of the officer, though highly injurious to the business or interest of the corporation. The individual, therefore, can sustain no action, nor for his character, for the words are not *per se* actionable, nor for his property, for he has sustained no special damage. His trade or business is not affected. The right of action, then, can only lie in the corporation whose business is affected and whose property is injured by the publication respecting its officer.

Nor is it perceived that there is any ground for apprehension that the freedom of discussion will be unduly restrained, or any principle of public policy trespassed upon by maintaining the right of a corporation to an action for libel. It is doubtless the dictate of sound public policy that the conduct of all corporations, in whose faithful management the public are interested, the character of their officers and the management of their business, should at all times be open to the keenest scrutiny and to the most free discussion. It constitutes the most effectual safeguard for the protection of the community, and especially of the ignorant and unwary, from fraud and im-

position. But the necessity of free and fair discussion can constitute no justification for injury inflicted by wanton and malicious libel. It must ever be borne in mind that the plaintiffs, in order to recover in such action, must prove not only that the statement is false, and that they have sustained special damage, but the jury must be satisfied that the defendant was actuated by malice. When the statement is false and injurious, it is still open for the defendant to show that the publication was prompted by proper motives and made for justifiable ends. The question of malice is always a question of fact for a jury: *Swan v. Tappan*, 5 Cush. 111.

Under such protection there is no reason to apprehend that the limits of free discussion will be unduly trench'd upon or narrowed to the prejudice of the public welfare.

The declaration in the present case alleges that the libel was published of and concerning the company, in their business, and of and concerning the directors of the company, and of and concerning the president, vice-president, and secretary of the company, and of and concerning the property and concerns of the company, and of and concerning the conduct and management of the property and concerns of the company by the aforesaid directors and officers of the company; and the special damage is charged to have resulted to the company, in a loss of its business and a diminution of its profits, in consequence of the libel. In this there is no misjoinder of the causes of action or substitution of improper parties. The libel must be regarded as one entire thing; and as such it relates obviously to the company, in the way of its business, to the character of its officers, to the property of the company, and to the management of its concerns, by reason of which special damage is alleged to have ensued to the company. It constitutes one ground of action, and the right of action is alone in the company, as the party aggrieved. It is lastly objected that the special damage is not legally assigned. The declaration charges that, by means of the libel, many and divers persons have been prevented and hindered from insuring their lives, and also from insuring their property in the said company, and have declined and refused to have any transactions with the said company in the way of their business, and that, by means of the premises, the receipts, gains, and profits of the plaintiffs in their business have been and are greatly lessened. The objection relied upon is, that the declaration should have stated by name what persons have refused to insure their lives and property in the company by re-

son of the libel, and from whom they would otherwise have received greater gains.

The general rule certainly is, that where the plaintiff alleges, by way of special damage, the loss of customers in the way of his trade, or the refusal of friends and acquaintances to associate with him, or the loss of marriage, or the loss of service, the names of such customers or friends, or the name of the person with whom marriage would have been contracted or service performed, must be stated: 2 Ch. Pl., 7th ed., 626, note *w*, 641 g, note *w*; *Moore v. Meagher*, 1 Taunt. 39; 1 Stark. on Slan. 203.

But the rule is relaxed when the individuals may be supposed to be unknown to the plaintiff, or where it is impossible to specify them, or where they are so numerous as to excuse a specific description on the score of inconvenience: *Hartley v. Herring*, 8 T. R. 130; *Hargrave v. Le Breton*, 4 Burr. 2422; *Westwood v. Cowne*, 1 Stark. 172; *Arlington v. Merricke*, 2 Saund. 411, note 4; 1 Stark. on Slan., 2d ed., 441.

The assignment of damages in the present case is within the principle of the cases cited, and conforms substantially to the precedent in a somewhat similar case, to be found in Cooke on Def. 314.

The declaration is neither defective in substance nor in form in any of the particulars assigned as grounds of demurrer, and there must be judgment for the plaintiffs.

THE PRINCIPAL CASE IS CITED in *Weiss v. Whittemore*, 28 Mich. 374, to the point that a general allegation of loss of trade is sufficient in ordinary cases of slander and libel, without setting forth the names of customers driven away or lost; and the declaration may be supported by evidence of such general loss; in Townshend on Slander and Libel, sec. 345, also, it is laid down as a general rule that the customers should be named, but the principal case is cited to show that this is not always necessary; and see *Id.*, sec. 284. Mr. Townshend further cites the principal case in sec. 262, to the effect that "a corporation, like an individual, may have a reputation, and a good reputation is equally as valuable to a corporation as to a natural person; and as an individual may sustain injury by language affecting his reputation, so in like manner may a corporation;" see also *Id.*, sec. 284. The principal case was referred to in *Weiss v. Whittemore*, 28 Mich. 375, as stating the principle governing libel, and giving instances of its illustration.

STATE v. COMMISSIONERS OF MANSFIELD.

[3 ELMERSON, 510.]

GENERAL POWER GIVEN CORPORATION TO ACQUIRE, HOLD, AND CONVEY PROPERTY IS LIMITED TO, and can only be exercised to effect, the purposes for which it was conferred by the government.

CORPORATE POWERS STRICTLY INCIDENTAL AND NECESSARY TO OBJECT OR GRANT ARE IMPLIED, in addition to those expressly granted; for although corporate powers are to be strictly construed, yet they are not to be so construed as to defeat the object of the grant.

PROPERTY OF CORPORATION IS EXEMPT FROM TAXATION, only in so far as it is necessary, and not merely convenient for the company to acquire and hold for the purposes for which it was incorporated, under a charter which, after making provision for the payment of certain duties, enacts "that no other tax or impost shall be levied or assessed upon the said company."

CERTIORARI SUED OUT IN THE NAME OF THE STATE BY THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANY, AS PROSECUTORS, TO THE COMMISSIONERS OF APPEAL OF THE TOWNSHIP OF MANSFIELD, IN BURLINGTON COUNTY. THE QUESTION SUBMITTED FOR THE CONSIDERATION OF THE COURT WAS, WHETHER CERTAIN DWELLING-HOUSES AND LOTS OF LAND OWNED BY THE COMPANY, AND LET BY THEM EXCLUSIVELY TO WORKMEN AND MECHANICS IN THEIR EMPLOY, WERE EXEMPT FROM TAXATION UNDER THEIR CHARTER. THE LOTS DID NOT CONSTITUTE A PART OF THE STRIP OF LAND WHICH THE COMPANY WAS AUTHORIZED TO PURCHASE OR TAKE FOR THE PURPOSE OF CONSTRUCTING THEIR ROAD.

Field, for the plaintiffs.

Vroom, for the defendants.

By Court, Potts, J. The property upon which the assessment complained of in this case was made consists of certain dwelling-houses and lots of land in the township of Mansfield, owned by the Camden and Amboy Railroad and Transportation Company, situate near the line of their road, and used exclusively by workmen and mechanics in the employ of the company. The charter of the company, after making provision for the payment of transit duties, etc., enacts "that no other tax or impost shall be levied or assessed upon the said company." This clause has been construed to operate as an exemption of the property in the hands of the corporation, and the stock of the company in the hands of the stockholders, from any further taxation than that provided for in the charter: *State v. Branin*, 23 N. J. L. 484, and cases there cited.

But the question has not been distinctly raised in any case which has heretofore come before the court, as to what partic-

ular property belonging to the company is within the operation of the exempting clause; whether it embraces every kind and description of property of which the company may have become possessed, without reference to its location or the purposes for which it has been acquired or used, or is limited to such real and personal estate as it was necessary for the company to acquire and hold for the purposes for which they were incorporated. In the *State v. Berry*, 2 Harr. (N. J.) 80, it does not appear upon what property of the Paterson and Hudson River Railroad Company the tax complained of was assessed. The question there made was, whether the exemption in the charter applied to the property of the company, or merely to the franchise. In the *Camden and Amboy Railroad Co. v. Hillegas*, 3 Id. 11, not a word is said as to what property had been taxed. And although in the case of the *Camden and Amboy Railroad Co. v. Commissioners of Appeal*, Id. 71, it does appear that the tax objected to was assessed on "an acre of land and three buildings and lots" belonging to the company, yet it does not appear, by the report, where this property was located, nor whether it was a necessary appendage of the road or not; nor was that question raised in the cause at all, as far as we can learn. The same may be said of *Gardner v. The State*, 21 N. J. L. 557. The particular question made in this cause is, then, for the first time before this court for adjudication.

This company, though created for public purposes, is technically a private corporation. The general power of "purchasing or otherwise receiving and becoming possessed of, holding, and conveying of real and personal estate," conferred on it by the second section of the charter, is a power limited to, and can only be exercised to effect, the purposes for which it was conferred by the government: *Angell & Ames on Corp.*, c. 3, p. 59. It is a part of the franchise; and the exercise of the corporate franchise, being restrictive of individual rights, can not be extended beyond the letter and spirit of the act of incorporation: *Beatty v. Lessee of Knowles*, 4 Pet. 152, 168. There is no doubt about the soundness of these general principles, the difficulty always is in applying them to the infinite variety of particular cases which arise in practice.

The Camden and Amboy Railroad and Transportation Company was incorporated for the specific purpose of perfecting an expeditious and complete line of communication from Philadelphia to New York. This was to be effected by constructing a railroad or roads from the Delaware river to Raritan bay, with

all necessary appendages. And they were further authorized to enter into the business of transportation upon the said line. For this purpose, they were empowered to purchase, or take by appraisement, the land and materials necessary to construct the road, and to provide the means of transportation between the cities of New York and Philadelphia; and they were limited, on the route of the road, to a strip of land not exceeding one hundred feet in width. Although grants of corporate powers are to be strictly construed, yet they are not to be so construed as to defeat the object of the grant; and hence all such powers, in addition to those expressly granted, as are strictly incidental and necessary to that object are implied. Power to construct a railroad, and establish transportation lines upon it, necessarily includes the essential appendages required to complete and maintain such a work and carry on such a business; as the power to erect and maintain suitable depots, car-houses, water-tanks, shops for repairing engines, etc., houses for switch and bridge tenders, coal or wood yards for fuel for the use of their locomotives, etc. And these are within the fair construction of the exempting clause, because they are necessary and indispensable to the operations of the company and the accomplishment of the objects of their charter. But there must be a limit somewhere to this incidental power of the company to enlarge its operations and extend its property without taxation under this exempting clause, and that limitation, I think, must be fixed where the necessity ends, and the mere convenience begins. The necessary appendages of a railroad and transportation company are one thing, and those appendages which may be convenient means of increasing the advantages and profits of the company are another thing. It might be advantageous for the company to purchase land, and to erect houses in the right location and of the right kind for all their constant employees, to establish factories for making their own rails, engines, and cars, even to purchase coal mines and supply themselves with fuel; but these are not among the necessary powers of such a company.

In the case of *The Lehigh Coal and Navigation Co. v. Northampton County*, 8 Watts & S. 334, it was held that, inasmuch as an incorporated canal was not taxable by the laws of Pennsylvania, not only the bed, berme-bank, and tow-path of the canal, but the lock-houses and collectors' offices, were also exempt, these being considered as constituent parts of the canal, or necessarily incident thereto.

In the case of *Railroad v. Berks County*, 6 Pa. St. 70, it was

held that, as the railroad was exempt from taxation, water-stations and depots, including the offices, oil-houses, places to hold cars, etc., such places being necessary and indispensable to the construction and use of the road, were within the exemption; but that warehouses, coal-lots, coal-shutes, and wood-yards, used or intended to be used as depots for merchandise, coal, wool, etc., for transportation, and machine shops for the manufacture of engines and cars, etc., form no part of the construction of the road; they are only indispensable to the profits to be made by the company, and are legitimate subjects of taxation; they are not appurtenant to the road, but to the business done upon it. This case is not precisely analogous to the one before us. The exemption applies not to a railroad and transportation company, but to the road only. It is referred to simply as showing the distinction taken between appendages which are absolutely necessary to carry into effect the objects of the corporation and such as are merely useful, convenient, and profitable for carrying on its business. Judge Jones, who delivered the opinion of the court of common pleas in the above case, said: "Whilst it was clear that water-stations and depots of the company are not subject to taxation, we can not but come to a different conclusion with regard to that portion of the property which is occupied by the company for the manufacture, construction, and repair of the locomotives, cars, and other machinery used upon the railroad; and that notwithstanding the case admits that it is necessary for the proper transaction of the business of the company. Certainly it is necessary that locomotives and cars should be manufactured, constructed, and repaired; but the right to do all this is not necessary or incident to the making and maintaining of the railroad, the conveyance of passengers, and the transportation of the mails, and of goods, commodities, and merchandise thereon." "The legislature never intended to add manufacturing privileges to the great ones already conferred upon this company. If the company may manufacture iron and wood into locomotives and cars for their own use, they may also manufacture rails, etc.; and then, as iron and wood and coal are necessary to these purposes, the company may purchase iron mines and forests and coal mines, and may erect furnaces and forges and rolling mills; and thus, under the interpretation of the charter here contended for, subtract a large amount of property from taxation, and become a gigantic manufacturing corporation." And in reviewing the case in error in the supreme court, the court said:

"In the case before us it is not enough that it is a convenient possession, or that it affords facilities in carrying on the business of the company"—"these erections and conveniences form no part of the road; they are (only) necessary and indispensable facilities to increase the business on the road and to enable the company to make profits."

Inhabitants of Worcester v. Western R. R. Co., 4 Met. 564, seems to be a well-considered case. The court held that the railroad of this corporation was to be treated as a public easement, and, with the works necessarily incident to such public easement, to some extent at least was exempt from taxation. It was not only a railroad, but also a transportation company. It had authority to lay out a road five rods wide, and, for the purpose of cuttings, embankments, and procuring stone and gravel, to take as much more land as might be necessary for the proper construction and security of the road. The question was this: the company, in the town of Worcester, had erected a house for a passenger-depot, a freight-house, a car-house, and an engine-house, partly within and partly without the railroad location. The assessor assessed a tax on all these erections; the commissioners of appeal abated so much of it as was assessed upon buildings lying within the five rods. Of this the town of Worcester complained. The court, however, dismissed the complaint. "No doubt," said the chief justice, "in practice the main use of the strip of land of five rods in width, in the greater part of its extent, will be for sustaining the track for the trains to pass over; but such restriction of its use is not found in the act; and therefore, when the corporation have occasion to use any part of such strip of five rods for any of the purposes incident to their creation, it is within their franchise; and being used to promote the purposes contemplated by the act, it is exempted from taxation as property appropriated to public use." And the chief justice added: "In addition to the power of taking lands for the construction and use of a railroad, the corporation are vested with the power of purchasing lands. The main object of granting this authority, we think, was to enable the corporation to enter into agreements with private proprietors for such lands as they might want to construct their road upon, so as not to be compelled to take it against the will of the owner under the provisions of the act. But though this was the leading purpose, the authority was not limited to that. It was general in its terms, and authorized the corporation, by purchase, to acquire a title to land beyond the

limit of their location, which might be convenient, though not necessary to the accomplishment of their object." But in that case the court held that such property would not be exempt from taxation.

Upon principle, we must affirm the assessment made by the assessor of the township of Mansfield. These dwelling-houses and lots for the accommodation of the workmen of the company are not necessary appendages of a railroad or of a transportation business; they are convenient appendages, no doubt, but nothing more. Nor are they within the limits authorized to be appropriated by the company. The legislature, in exempting the company from all other taxes except the transit duties, only intended to include so much property as was necessary and essential to a railroad and a transportation business, such as the corporation was created to construct and carry on.

GREEN, C. J., and ELMER, J., concurred.

CORPORATIONS MAY HOLD WHAT PROPERTY.—The land which a canal company may buy is not limited to a mere passage for the canal; a reasonable discretion is vested in the company in respect to the purchase: *Spear v. Crawford*, 28 Am. Dec. 513; but corporations have by common law a right to acquire and hold land, except only so far as restricted by the objects of their creation, or the limitations of their charters: *Lathrop v. Commercial Bank*, 33 Id. 481; and for a case where the corporation was specially restricted by its charter, see *President etc. of Bank of Michigan v. Niles*, 41 Id. 575. The principal case was cited in *Black v. Delaware & Raritan Canal Co.*, 22 N. J. Eq. 410, to the effect that the *dictum* of Potts, J., therein would seem to imply that the power conferred on corporations without limitation to hold property is confined to such property as is necessary and convenient for the purpose of its charter; yet the application of the principle was that the authority to hold extends to all property that it may be expedient or convenient to hold, the better to effect the purposes of the charter. See further the cases collected in the next following note on the incidental powers of corporations.

CORPORATIONS POSSESS WHAT INCIDENTAL POWERS: See as to private corporations: *Munn v. Commission Co.*, 8 Am. Dec. 219; *People v. Utica Ins. Co.*, Id. 243; *N. Y. Firemen Ins. Co. v. Ely*, 13 Id. 100; note to *Mott v. Hicks*, Id. 561; *The Banks v. Poitiaux*, 15 Id. 706; *McCartee v. Orphan Asylum Soc.*, 18 Id. 516; *Barker v. Mechanic F. Ins. Co.*, 20 Id. 684; *Leggett v. N. J. Man. & Bank Co.*, 23 Id. 728, and note; *Gordon v. Preston*, 26 Id. 75; *Spear v. Crawford*, 28 Id. 513; *Pennsylvania etc. Steam Nav. Co. v. Dandridge*, 29 Id. 543; *Lathrop v. Commercial Bank*, 33 Id. 481; *Commercial Bank v. Newport Man. Co.*, 35 Id. 171; *Burrill v. President etc. of Nahant Bank*, Id. 395; *President etc. of Bank of Michigan v. Niles*, 41 Id. 575; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R.*, 44 Id. 556; *Rivanna Nav. Co. v. Dawsons*, 46 Id. 183; *Blair v. Perpetual Ins. Co.*, 47 Id. 129; *McIntire v. Preston*, 48 Id. 321; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.*, 53 Id. 742; *Susquehanna B. & B. Co. v. General Ins. Co.*, 56 Id. 740; and as to municipal corporations: *People v. Corporation of Albany*, 27 Id. 95;

President etc. of Bank of Chillicothe v. Mayor etc. of Chillicothe, 30 Ill. 185, and note; *State v. Mayor etc. of Mobile*, Id. 584; *Robinson v. Mayor etc. of Franklin*, 34 Id. 625, and note; *Collins v. Hatch*, 51 Id. 465.

EXEMPTION OF PROPERTY OF CORPORATION FROM TAXATION, HOW FAR EXTENDS: See *Mayor etc. of Baltimore v. Baltimore & O. R. R.*, 48 Am. Dec. 531. Under a general exemption of a corporation from taxation, only that property which is incident and necessary for its uses and purposes will be within the clause. The principal case was cited to this proposition in *State v. Hancock*, 35 N. J. L. 545; *Illinois Cent. R. R. v. Irvin*, 72 Ill. 456; and followed in *State v. Collectors of Newark*, 26 N. J. L. 523, 524; and in *Cook v. State*, 33 Id. 479, it was cited as settling, with the last case, this question; but it was said that in neither of these cases was the question considered or decided whether property which the company was expressly authorized to hold should be exempt when used for purposes not authorized by the charter; the language of these decisions and the reasoning on which they are founded would seem, however, to exclude from the exemption all property used for other purposes, whether authorized to be held or not. The principal case was further distinguished in *State v. Lester*, 29 Id. 542, in holding certain property of a library association to be exempt from taxation under its charter, in that in the principal case and subsequent cases founded upon it the exemption was in general terms; so, also, in *State v. Gaffney*, 34 Id. 132, which arose under an act exempting certain lands held by a municipal corporation in another county for the purpose of supplying the corporation with water, it was said of lands not in actual use, and held by it: "The land was not held for speculation, or to meet a remote, contingent expectation of necessary use, or for a mere incidental convenience, and hence the case of *The State v. Mansfield*, 3 Zab. 510, and the other cases based upon it can have no application;" and see *State v. Haight*, 35 N. J. L. 44, 46. The narrow construction given to the word "necessary" in the principal case was not approved in *State v. Hancock*, 35 N. J. L. 545, 546, and it was held that it is not to be contradistinguished from the word "convenient," but that it included whatever was obviously appropriate and convenient in carrying into effect the franchise granted; see this observation made in *State v. Love*, 37 Id. 62.

CASES AT LAW
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

WOODRUFF v. CHAPIN.

[3 ZABRISKIE, 664.]

DISPOSITION OF ENTIRE FUND RAISED ON EXECUTIONS ISSUED OUT OF SEVERAL COURTS may lawfully be assumed by that one of the courts into which the money is paid by the sheriff, either voluntarily or by consent of parties, when there is a question upon which one of the executions the money is actually made, or to which of several plaintiffs in executions it is payable.

COURT MAY COMPEL MONEY RAISED UPON ITS OWN PROCESS TO BE BROUGHT INTO COURT to direct its disposition, but can exercise no such power over the process of another court.

WRIT of error which removed into the court of error and appeals an order of the supreme court settling the priorities of execution creditors of one Gregory. The facts and the questions involved are sufficiently stated in the opinion.

Zabriskie and Whelpley, for the plaintiff in error.

Scudder and Vroom, for the defendants in error.

By Court, GREEN, C. J. This case arises out of a controversy between execution creditors respecting the proceeds of sales of personal property, made by virtue of three several writs of execution, issued out of three different courts, directed to the sheriff of the county of Sussex. The first execution in point of time issued out of the Sussex common pleas, at the suit of Osborne; the second writ issued out of the Sussex circuit, at the suit of Woodruff, the plaintiff in error; and the third writ issued out of the supreme court, at the suit of the defendants in error. At the instance of the defendants in error, a rule was entered

in the supreme court, requiring the sheriff to pay into the hands of the clerk of that court "all moneys made by him by virtue of any sale or sales under the said executions or any other executions." A rule was also entered in the said court requiring the plaintiffs in the two first-named executions, respectively, to show cause why the moneys so raised should not be paid and applied toward the satisfaction of the judgment of the defendants in error. The rule to show cause was subsequently made absolute, and the entire proceeds of the sale directed to be paid to the defendants in error, who hold the youngest execution.

The first question for consideration is, whether the court below had jurisdiction of the subject-matter, and power to make the order in question. The power of requiring money raised upon execution to be paid into court, and of controlling its disposition when so paid in, has been long and familiarly exercised by the courts of this state. It is an exercise of power, essential alike to the security of the officer and to the efficient execution of final process. The command of every writ of *fieri facias* is, that the sheriff shall pay the money made upon the execution into the court out of which the writ issues, and although in practice it is usual for the sheriff to pay the money directly to the plaintiff, he may at all times, for his own security, pay the money into court, and thus relieve himself from the responsibility of deciding upon the validity or priority of conflicting claims. If he pays the money levied upon execution to either of two or more conflicting claimants, he exposes himself to the vexation and expense of a suit, and to the hazard of being eventually compelled to repay the money. When the fund is in court, the court have, of necessity, a right to control it. This right of control over moneys raised upon execution does not rest, as was insisted upon the argument, upon any abuse of the process of the court by the officer who executes the writ. The question touching the disposition of money raised upon execution is in fact rarely a question of abuse of process, but usually arises, as in the present instance, out of a question of priority, sometimes, though not always, involving a question of fraud.

Nor is the control over moneys raised upon execution exercised by virtue of the general superintending power of the supreme court over other tribunals, or over its own officers. The power pertains to every court out of which process is issued, and may be exercised as well by the circuit courts or courts of common pleas as by the supreme court. Nor is the power

limited to the case where all the contending claims are founded on executions issued out of the same court. Nor is it essential to the due exercise of the power that the court should have jurisdiction over the persons of the parties having conflicting claims by their being parties to the record in a suit pending in court.

The court has jurisdiction over the fund to be disposed of, by reason of its being in court. When there, the court not only may, but must, direct its final disposition. If, as was contended on the argument, the court may declare invalid, or postpone, its own process, but not the process of another court, the power of control would be nugatory. They might decide against the suitors in their own court, but not in their favor; and when, as in this case, there is process issued from several courts, and especially where process from other courts intervenes between different writs from the same court, no one court could possibly direct the disposition of the entire fund. The parties would be compelled in such case to resort to all the courts successively out of which the process issued, or be driven into equity to settle the order of priority. The exercise of this power by some one tribunal is important, not only to protect the officer from the harassing vexation of conflicting claims, but to put an end to litigation and to secure the fruit of the execution. If the court may not, by its order, finally dispose of the fund, so as at once to protect the sheriff and conclude the rights of the parties, there can be no end of controversy. The termination of one suit would be but the beginning of another, without the possibility of obtaining the fruit of an execution. The practice has been so long established, and the principle upon which it rests so often recognized, that it is not to be regarded as open to a doubt.

The important question is, Under what circumstances may the power to control money raised on execution be rightfully exercised? As already said, it may be exercised by any court out of which process of execution is issued. But it does by no means follow that the question, by what court the power is to be exercised, is left to be decided by a mere scramble for priority. This supposed difficulty could only have been suggested by confounding the power to control money already in court with the power to compel it to be paid into court. When the money is once in court, the jurisdiction of the court attaches. The court may compel money raised upon its own process to be brought into court in order to directs its disposition, but they can exer-

cise no such power over the process of another court. When there is a question upon which one of several executions the money is actually made, or to which of several plaintiffs in execution it is payable, that court into which the money is paid by the sheriff, either voluntarily or by consent of parties, may lawfully assume the disposition of the entire fund. The power of the court to dispose of the money results from the fact that, by the return of the sheriff, the money is in court by virtue of its own process, and that the court alone can properly direct its disposition.

The difficulty in the present case arises, not from the fact that the court below disposed of moneys in court, but that they compelled the sheriff to bring into that court moneys raised by virtue of the process of another court. The money was not returned by the sheriff as levied by virtue of the execution out of the supreme court. It was not paid into that court by the sheriff voluntarily nor by consent of parties. The rule upon which the proceeding below was founded, after setting forth that the goods of the defendant were sold by the sheriff under and by virtue of three several executions, one out of the supreme court, another out of the Sussex circuit, and another out of the Sussex pleas, and making a suggestion of fraudulent abuse in regard to the last two writs, ordered the sheriff forthwith to pay into the hands of the clerk of the supreme court all moneys raised by virtue of sales made under the above-named executions or any other execution.

Treating the money in the sheriff's hands, for the purpose of this argument, as actually paid into court, as under the circumstances we are bound to do, still it can not be assumed that the money was so paid voluntarily. It must be deemed to have been paid under the compulsory order of the court. That order was erroneously entered; the court had no power to make it. It assumed jurisdiction over moneys raised by virtue of the process of other courts. It not only commanded the sheriff to pay into court all moneys raised upon the execution issued out of the supreme court, but also all moneys raised by virtue of executions out of the circuit court and court of common pleas. The sheriff, by paying the money into court in obedience to that order, can not be deemed to have made the admission, much less the return, that the whole or any part of the fund was raised by virtue of the execution issued out of the supreme court.

And by the lists of articles sold by virtue of the several writs, which are exhibits in the cause, it appears that the prop-

erty was not all levied upon and the moneys made upon the same executions; but, on the contrary, that certain goods were levied on and sold, and a certain amount of money made, by virtue of each execution, in a specified order of priority: that under the Osborne execution there was raised by sale sixty-one dollars and eighteen cents; under the Woodruff execution three hundred and seventy-eight dollars and twenty-seven cents; and under the execution of Chapin and others (the defendants in error) there was made only twenty-five dollars and sixty-five cents. So that it appears affirmatively from the evidence that the money paid into the supreme court, in obedience to the compulsory order of the court, was principally made, not upon an execution issued out of that court, but upon prior executions issued out of other courts. The order was improvidently entered. It exceeded the authority of the court.

Upon this ground, as well the rule directing the sheriff to pay into the supreme court the moneys raised upon the prior executions issued out of other courts, as also the final order of the court thereon, is erroneous, and must be vacated and set aside.

Judgment below reversed unanimously.

COURT, WHEN MAY COMPEL SHERIFF TO BRING IN MONEY RAISED ON EXECUTION.—A sheriff may be compelled to bring into court money raised on execution, and when brought in, either voluntarily or by order, the court may determine conflicting claims thereto: *Stebbins v. Walker*, 25 Am. Dec. 499. But if the money is raised on an execution from another court, the sheriff can not be directed to bring it in for distribution: *Jones v. Jones*, 18 Id. 327. The principal case was cited in *Heinselt v. Smith*, 34 N. J. L. 218, to the point that the court out of which a junior execution has issued has no jurisdiction over the proceeds of a sale made by the same sheriff of goods upon which he had made a prior levy by virtue of an older execution out of another court.

AMERICAN PRINT WORKS v. LAWRENCE. HALE v. LAWRENCE.

[3 ZABRISKIE, 590.]

CONSTRUCTION OF STATUTES OF STATE BY ITS COURTS SHOULD BE ADOPTED
by the courts of other states. *Per Carpenter, J.*

PUBLIC OFFICERS ARE NOT PERSONALLY LIABLE FOR CONSEQUENTIAL INJURIES arising out of acts done by them under lawful authority and in a proper manner, at least, when acting without private emolument in a matter of public concern.

PUBLIC OFFICER IS NOT PERSONALLY RESPONSIBLE for the necessary and unavoidable destruction of goods stored in buildings, when such build-

ings were destroyed by him, in the lawful performance of a public duty imposed upon him by a valid and constitutional statute.

PRIVATE PROPERTY MAY BE DESTROYED BY INDIVIDUAL, in the exercise of the common-law right of necessity, to prevent the spreading of a conflagration, although his own property is not in imminent danger.

TRESPASS against the defendant for destroying the goods of the plaintiffs by gunpowder. The pleadings and points involved in both cases are the same. A plea of justification in the cases had been previously held bad on demurrer by the court of errors and appeals in *Hale v. Lawrence*, 47 Am. Dec. 190. The defendant, having obtained leave to plead anew, then put in two special pleas of justification, besides the general issue; the plaintiffs filed replications; and the defendant demurred. The demurrer was sustained by the supreme court, and the replications overruled. It was assigned as error that judgment should have been given for the plaintiffs, and not for the defendant. The two pleas are sufficiently set forth in the opinion.

W. W. Van Wagenen, for the plaintiffs in error.

Davies and B. Williamson, for the defendant in error

By Court, CARPENTER, J. These causes are now for the second time before this court. Upon a former occasion, they came up upon demurrer to a plea of the defendant, who set up, as a justification of the act charged to be a trespass, that it was done by him, as mayor of the city of New York, under the authority and in pursuance of a statute of the state of New York, by which certain duties were imposed upon him as such officer. He pleaded in justification that the act was done by him in the performance of the duties imposed upon him by the statute, and by virtue of the authority so given, as he alleged it was lawful for him to do.

This plea of justification rested upon the statute, and the defense so set up was sustained by the supreme court of this state, upon the authority of decisions in the courts of New York, in a series of cases arising out of the very act here charged to be a trespass. But this court reversed the decision of the supreme court, and overruled the plea because it rested upon the statute alone, which the court held, so far as it attempted to confer any power over personal property for which it made no compensation, to be unconstitutional and void.

Dissenting from the view taken by the courts of New York, this court held that the statute was not a mere regulation of a

pre-existing natural right, but a grant of a new power to take or destroy private property for public use or public safety; and taking this view of the statute, that it was constitutional only so far as it provided compensation for the property destroyed.

The judgment of this court, perhaps in strictness, went no further, looking only at the point necessarily involved in the decision, though the opinion delivered may have assumed some other and additional principles.

By that decision, this court held the statute of the state of New York to be so far unconstitutional, notwithstanding that the constitution of the state of New York was not before us by pleading, of which, therefore, we could not properly take judicial cognizance, and notwithstanding that the statute had there been sustained as valid in every respect in which it had been presented for consideration. I say, notwithstanding that it had been held by the courts of New York to be a constitutional and valid law, it was here held to be unconstitutional and void, and to afford no justification to a public officer acting under its provisions and in strict obedience to its mandates. I have before expressed my earnest dissent from that decision, not because I would give a different construction to the statute, were its primary construction the proper subject of our consideration. As I then intimated, I should be disposed to treat a similar statute of this state, were any such to be enacted, as a grant of power. But I could not unite in a decision placing a construction upon a statute of the state of New York different from that adopted by the courts of New York.

I could not hold the statute to be unconstitutional and void when it had never been so declared by the courts of the state to which its interpretation primarily belonged, but on the other hand had been expressly held to be constitutional in a cause arising entirely within that state, and which I thought ought to be regulated strictly by the *lex loci*. Upon what authority or principle could we assume the exercise of such a power? It has been decided by the supreme court of the United States, that court refusing to declare an act of a state legislature void because of its conflict with the constitution of the state: *Jackson v. Lamphire*, 3 Pet. 280; *Watson v. Mercer*, 8 Id. 88, 109.

The question whether a state law is constitutional or not, on the ground of repugnancy to a state constitution, is not cognizable by the supreme court of the United States. It is exclusively confined to the state courts, and obviously to the courts of the state by whom the act was passed. at any rate, in

regard to all causes of action arising within such state. Indeed, the supreme court of the United States (as I have already on a previous occasion remarked), in all controversies arising under the statutes of the respective states, conforms to the decisions of the courts of those states in regard to the construction of their own statutes, so far as they comport with the constitution of the United States. In cases depending upon laws of a particular state, it uniformly adopts the construction which the courts of the state have given to those laws. "This course," says Chief Justice Marshall, "is founded on the principle, supposed to be universally recognized, that the judicial department of government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute:" *Elmendorf v. Taylor*, 10 Wheat. 152. This doctrine, so forcibly and justly expressed, and so important to the proper working of our system of associated state governments under different laws administered by different judicial tribunals, is to be found in almost any volume of the reports of that high tribunal, where it is acted upon as a settled rule. Some additional authorities to the point are collected in a recent decision of the district court of Virginia: See *Prentice v. Zane*, 11 Boston Law Rep. 208.

This court, and it is the first court so far as I know, has departed from this principle, and adopted some other rule. We have not received the construction of the statute given by the courts of the state of New York as the true sense of a law of their own state, but have taken the liberty to depart from that construction. We have undertaken to say that the courts of New York misunderstood one of their own statutes, and we have assumed the power to correct such misunderstanding; and in all this, according to my judgment, we have most erroneously departed from a principle supposed, by the eminent judge whose words I have cited, to be universally recognized, to wit, that the judicial department of each government is the appropriate organ for construing the legislative acts of that government.

Sitting in this court of last resort, I regard it as my duty, with all respect to those who may differ from me, to reiterate my views of the principles by which we ought to be guided in the examination of the statute laws of other states; I regard them as first principles, which can not be shaken by the erroneous decision of any court, whatever may be the effect of such decision upon a particular cause.

But, passing the propriety of that decision, the case as now presented (I treat them as one) offers quite another question. There are two special pleas, the validity of which is now the subject of discussion. These pleas are not demurred to, but the plaintiff has filed replications, to which the defendant has demurred. It may be proper here to remark, that the defendant has demurred specially to the replications filed by the plaintiff; and of course this brings up for consideration every exception taken, even to the form of these replications. But, as the plaintiff has pleaded over, no exception to the pleas is open to him but for error in substance, and such as would be available on general demurrer.

The first special plea sets up the statute of New York, and the duty imposed by that statute upon the mayor of the city of New York, in order to stop the progress of any conflagration, with the consent and concurrence of two aldermen, to direct any buildings likely to take fire, and convey fire to others, to be pulled down and destroyed. That the defendant, as mayor, acting under such advice and concurrence, did destroy certain buildings for that purpose which were peculiarly exposed to the fire, and but for his action would have been immediately burned up with their contents, and would have communicated the flames to adjoining buildings unless instantly demolished. That the immediate destruction of these buildings was necessary, without waiting to remove the goods, in order to prevent the spread of the conflagration; and that at the time of the blowing up and destruction of the buildings, the goods could not have been removed or saved before the buildings would have taken fire, and communicated the flames to other buildings, and thereby endangered a great and valuable portion of the city, etc., wherefore the defendant says he did necessarily, in order to prevent, etc., blow up and destroy certain buildings, and in so doing did necessarily and unavoidably blow up and destroy certain goods in the plaintiff's declaration mentioned, as it was lawful and necessary for him to do.

This plea, to which I have referred in a general way only,

justifies not on the ground of a common-law necessity, but of a necessity, so to speak, arising out of a statute. It sets up that the mayor destroyed the buildings for the purpose of stopping the conflagration, under the advice and with the consent of two aldermen, in the performance of a duty imposed upon him by the statute. It sets up the duty imposed upon him by the statute of destroying the buildings in which the goods were stored, and alleges that the goods could not have been removed and saved before the said buildings would have taken fire, and endangered and communicated the flames to other buildings; and that the said goods were, therefore, necessarily and unavoidably destroyed. Now, if the statute under which the buildings were destroyed was a constitutional and valid law in respect to the destruction of the buildings, and if the officer, in the discharge of a public duty, lawfully performed the act by which the buildings were destroyed, and the goods were necessarily and unavoidably destroyed in the performance of that duty, it seems to me that the plea sets up a good defense. If, under the exigencies of the imminent peril which at the time of the great fire threatened the city of New York, it was the duty of the mayor to order the immediate destruction of the buildings, as necessary for the preservation of the city, the necessity and authority of instantly blowing up the buildings involved the authority and necessity of blowing up their contents with them, if they could not be removed.

Whatever may have been the view heretofore taken of the New York statute by this court as to the authority thereby conferred to destroy goods, it has not been held, either here or elsewhere, that it is not a constitutional law, so far as regards the destruction of the buildings and to the extent to which provision has been made for compensation.

The statute, as far as I understand the prior decision of this court, has only been held void *pro tanto* where it authorized destruction without providing compensation. In the destruction of the buildings, then, the defendant acted under a valid and constitutional law. Adopting the language of the court below, the real ground of complaint is, that the defendant exceeded the authority conferred by the statute, and thereby became a trespasser, because he destroyed not only the buildings which he might lawfully destroy, but also the plaintiff's goods, which were in the buildings, and which the statute, it is alleged, gave him no authority to destroy. Now, for doing the lawful act of destroying the buildings in order to arrest the conflagration—

an act which, in the exigency of the case, was not only lawful but the imperative duty of the defendant, as a public officer, to do, if the goods were unavoidably and necessarily destroyed, it not being possible to remove them but with the hazard of losing all the benefit to result from the act—the defendant ought not to and can not be held liable. A public officer, acting in good faith upon a sudden and alarming emergency, under the sanction of a constitutional and valid law in a matter of public duty, is not to be held responsible for the unavoidable and necessary result of such act of duty. An injured party may have a right to resort to the public for satisfaction, but the law has ever held that the officer himself, not exceeding his power and not guilty of oppression or bad faith, is not personally liable: *The Governor and Co. etc. v. Meredith*, 4 T. R. 794; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crowther*, 2 Barn. & Cress. 703; Nevius, J., in *Sinnickson v. Johnson*, 2 Harr. (N. J.) 150 [34 Am. Dec. 184]; Nevius, J., in *Ten Eyck v. Del. & Rar. Canal Co.*, 3 Id. 203 [37 Am. Dec. 233]; *Wilson v. Mayor etc. of New York*, 1 Denio, 595 [43 Am. Dec. 719]; *The Executors of Radcliff v. The Mayor etc. of Brooklyn*, lately decided in the court of appeals of New York, and not yet regularly reported, 4 N. Y. 195 [53 Am. Dec. 357].

In the case in New York last cited, Chief Justice Bronson, who delivered the opinion of the court, remarked that it would be absurd to say that public officers may be liable to an action for what they have done under lawful authority and in a proper manner. "When the state," said Justice Nevius, in another case, "authorizes an act to be done exclusively for the public interest, and appoints an agent to execute that act, and such agent shall act within the scope of his authority, he can not be personally responsible to individuals for the consequences of executing his commission. Should private property be necessarily and unavoidably injured, taken away, or destroyed, by the execution of such trust, without any compensation provided in the act itself, the remedy can only be by contesting the constitutionality of the law or appealing to the magnanimity of the legislature:" *Sinnickson v. Johnson*, 2 Harr. (N. J.) 150 [34 Am. Dec. 184]. In *Ten Eyck v. The Del. & Rar. Canal Co.*, 3 Id. 203 [37 Am. Dec. 233], the same judge expressed like views, and held, that in case of public agents, the remedy can not be against them, but only by an appeal to the justice of the legislature that directed the act. This doctrine, even to this extent, is not without the support of other high authority. Chancellor Kent

said that it is not to be understood that a statute assuming private property for public purposes without compensation is absolutely void, so as to render all persons acting in execution of it trespassers. Some of the judicial *dicta* seem to go that length, but others do not. But he thought the reasonable and practicable construction to be, that the statute would be *prima facie* good and binding, and sufficient to justify acts done under it, until a party was restrained by judicial process founded on the paramount authority of the constitution; 2 Kent's Com., 5th ed., 340, note. Without expressing my opinion as to the extent or weight of this doctrine, though it seems to be highly reasonable, it is enough for the decision of this case that we recognize the well-settled principle that public officers, acting without private emolument in a matter of public concern, shall not be personally liable for the consequential injuries arising out of an act done by them under lawful authority and in a proper manner.

Under the New York statute, the defendant, as mayor, was bound by duty to do what, according to the advice of two aldermen, was necessary to prevent the spread of the conflagration. The act which constituted them judges of the necessity of destroying the buildings made them judges of the time at which the act of destruction became necessary. The plea avers that the buildings were destroyed at the time and in the manner which the imminency of the danger demanded, and that the destruction of the buildings necessarily involved the destruction of the goods, the buildings being destroyed in the performance of a duty which, as a public officer, the defendant was bound to undertake. The destruction of the goods was the unavoidable consequence of the destruction of the buildings. I deem it clear that the defendant ought not to be held personally responsible for the consequence of such act of duty, and that the plea sets up a sufficient defense.

The second special plea is so framed as to set up a justification arising out of the common-law doctrine of necessity, and it seeks no aid from the statute. It sets out that there was a fire raging in the city of New York, which threatened destruction to a large portion of the city; that certain buildings were peculiarly exposed and likely to take fire, and communicate fire to other buildings, and but for the acts of the defendant would have taken fire and communicated, etc.; that to prevent the spread of the conflagration and the destruction of a large portion of the city, the immediate destruction of the said buildings was necessary, without waiting to remove the goods therein; and that for

this purpose the defendant, a resident citizen and owner of valuable buildings in the city, caused the said buildings to be blown up, and did thereby necessarily and unavoidably destroy the goods, etc.

The plea does not in terms aver that the goods were the cause of alarm and danger, and therefore the immediate object of destruction, but that necessity required the immediate destruction of the buildings, without waiting to remove the goods, which unavoidably involved the destruction of the goods. The plea sets up that the buildings and the goods were so connected that the necessity of destroying the former necessarily involved the destruction of the latter; and the justification is made to rest upon the ground that the right to destroy the buildings must therefore include the right to destroy the goods.

If, which I do not in the least doubt, there can be an imperious, overwhelming necessity of instantly destroying buildings, without waiting to remove the goods stored therein, in order to prevent the spread of fire, I suppose this to be the mode in which that necessity must be pleaded, the goods themselves not being the cause of alarm or danger. The plea, therefore, does not seem to be obnoxious to the objection of argumentativeness. It is proper, however, to remark, that even if the plea were argumentative, it is an objection in point of form only, which can not be raised by general demurrer. It would not be available, therefore, to the plaintiff in the present instance, all objections to mere form having been waived by pleading over: Gould's Pl. 467, 468, sec. 18.

But the leading objection taken to this plea is, that it does not show any individual or personal interest in the defendant, nor any immediate overwhelming danger to him or his property. It is urged, that to make a valid plea, setting up the exercise of the right of necessity, the defendant must show that his own property was in imminent danger, and that the destruction was for the purpose of preserving it. That it is not enough that this defendant was a resident citizen of New York, owning property and having a general interest in the safety and welfare of the city, but that he could only so interpose when the act became absolutely necessary to preserve his own property from immediate destruction. I do not so understand the doctrine, as applied to that branch of the law of necessity now in question.

Such limited view was certainly not taken by this court on the former review; on the contrary, the language used in the

leading opinion would seem to lead to a very different conclusion. The right to take or destroy private property by an individual in self-defense, or for the protection of life, liberty, or property, was said to be a private and not a public or official right. It was said that it might be exercised by a single individual for his own personal safety or security, or for the preservation of his own property, or by a community of individuals, in the defense of their common safety or in the protection of their common rights: *Hale v. Lawrence*, 1 Zab. 729 [47 Am. Dec. 190]. Again, in reply to the argument that the destruction of the store and its contents, for which suit was brought, was not for the public use and benefit, in the sense in which those terms were used in the passage referred to, and therefore that the doctrine of eminent domain was not applicable, it was said the position would be true, if not done under the authority of the statute, but by the defendant by virtue of his natural right, and in defense of his own or of his neighbor's property, or by a number of individuals to prevent a common calamity that threatened a particular street or district: Id. 738. The force of the argument here depends upon the doctrine implied, if not directly expressed, that an individual may, in the exercise of the common-law right of necessity, take and destroy private property, not only in defense of his own but of his neighbor's property, and that individuals in a community may so act to prevent a general calamity to that community, and in protection of their common rights. If it be asked, "Who is my neighbor, for whose benefit this right of charity and kindness, as well as of necessity, may be exercised?" let the necessity itself, for which it is intended to provide, be the answer. But the passages I have cited have been referred to, not so much to establish the view which it seems to me may reasonably be adduced therefrom, as to show that this court is now not committed, even by *dicta*, to the more limited rule contended for by the plaintiff in error.

The common-law doctrine of necessity is one that is now too firmly established to be drawn in question, and yet, perhaps, necessarily from its very character, it seems somewhat undefined as to its application and extent. It may, by the way, be remarked, that it is not less unquestionable as an established doctrine, because its origin, so far as regards a justification at the common law, is only to be found in the illustrative arguments of the older authorities, and not in any direct adjudication. Its exercise must depend upon the nature and degree of

necessity that calls the right into action, and which can not be determined until the necessity is made to appear. The necessity must be immediate, imperative, and in some cases extreme and overwhelming. Mere expediency or utility will not suffice. The doctrine seems to arrange itself under different heads, to which somewhat different rules will be applicable.

The conservation of life is one of the occasions which will call it into exercise, of which the necessity of self-preservation is one of the marked and striking instances. Self-preservation is one of the great rules of our being, implanted in us by our creator, and recognized under this doctrine by the common law. The right to destroy property, or even life, when necessary for self-preservation, is an admitted right. Thus, as an instance frequently referred to, if two men be on one plank, insufficient to save both, and one be thrust off and drowned, the homicide is excusable, indeed justifiable through unavoidable necessity, upon the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, when one must inevitably perish: Noy's Max., p. 32, 25. The taking of viands to satisfy urgent hunger, the necessity being made to appear, this is no felony or larceny. So a jail being on fire by casualty, and the prisoners are enabled to get out, this is no escape nor breaking of the prison: 15 Vin. Abr., 534, Necessity.

Again, there is a necessity arising out of the act of God or of strangers, as of public enemies; and in regard to this, it is said one man may justify committing the private injury for the public good. Instances are thus put in an old authority. In time of war a man may justify making fortifications on another's land without license; also a man may justify pulling down a house on fire for the safety of the neighboring houses; for these are cases of the common weal: *Maleverer v. Spinke*, 1 Dyer, 36 b. See also the *Salt peter Case*, 12 Co. 13; *Mouse's Case*, Id. 63, etc. The ground on which this necessity rests, it is seen, is placed on the principle, not of mere individual necessity, but of the public good. The right may, as in the former class, be a private, and not a public or official, right; it may be one that appertains to individuals, and not to the state. But still the older authorities to which I have referred, and which are generally cited for the doctrine, place it, in these instances, not on the ground of the individual advantage of the actor, but of the common weal, in order to save the city. The case of pulling down a house in time of fire is given as an act done for the public good.

That branch of the doctrine to which I now refer is, of course, to be distinguished from that mere appropriation for public utility under a general state necessity, and which comes within the doctrine of the eminent domain. They are both spoken of sometimes as grounded on necessity, and they doubtless are so. But the latter stands strongly distinguished from the urgent necessity which, for immediate preservation, imperatively demands immediate action. His case who should throw up trenches on his neighbor's land for the protection of a town from an immediate hostile attack, as regards his justification, would certainly stand on a very different footing from one who, under the authority of law, should do the same act in order to guard the town from prospective and merely possible future harm. The one might be a private and unofficial act to protect the community, of which he was a part, from urgent danger; an act which might be justified under the doctrine of necessity, which, for the common weal, every man may do without an action. It is not necessary for my purpose to intimate any opinion as to whether, in the last case, the individual would or would not be personally responsible, but certainly the sufferer would come within the constitutional provision. The distinction between the cases when the act was done under the pressure of threatening danger which it was necessary to avert, and when taken for the benefit of the public under a grant of power, was well put by Chief Justice Nelson, in one of the New York fire cases arising under the statute so frequently referred to. "The one," he says, "presents a question of responsibility by a citizen acting under the influence of an overruling necessity, solely for the public good, the decision turning not so much upon the want of merit in the claim for redress, as upon the injustice of making the defendant liable, who had thus acted for the benefit of the public. The other, the case upon the statute, is a question between the sufferer and the city for whose benefit his property has been sacrificed, when the authorities of the city are empowered to determine at discretion when and under what circumstances it shall be thus sacrificed:" *The Mayor of New York v. Lord*, 17 Wend. 290, 291. "I entertain no doubt," says Justice Bronson, in the same case, "that in a case of necessity, to prevent the spreading of a fire, magistrates or individuals may destroy private property without subjecting themselves to an action for damages. This is only one of the many cases where the maxim applies, *Salus populi suprema lex*:" Id. 297. Chancellor Kent places the rule on the same ground, and says

it is lawful to raze houses to the ground in order to prevent the spread of a conflagration, because it is a case of urgent necessity, in which the rights of property must be made subservient to the public welfare: 2 Kent's Com. 338.

I have cited these authorities to show that a distinction must be made between the different branches of the law of necessity. The distinction must now be apparent between that overwhelming necessity which will justify one in the destruction of the person and property of another, and when the right is solely for the advantage of the actor, and that necessity which arises from the danger of conflagration in a great city, or other analogous instances, and which rests for its exercise upon the subservience of private rights to the public good. It may well be that a person shall not justify the destruction of another in order to save a stranger. An assault is only justifiable when committed in the defense of one's self, or of those who stand in some near and dear relation to the actor. The necessity of self-preservation, which is for the advantage of the actor, can have no wider foundation. The right being a personal one, it is reasonable to suppose that it can be exercised only by the party in danger for his own benefit, or, as would seem to be a reasonable conclusion, for the safety of husband or wife, parent or child. But can the same rule apply to the efforts which must so frequently be made to save a city from fire, and which rests upon a less restricted principle? There can certainly be no such limitation of the right as is inconsistent with the reason of the law and the object to be obtained by its exercise. In vain would the call be made on firemen and others to stay the progress of the flames, if the imminent danger of one's own property could be the only justification of any necessary act of destruction in order to effect that object. If a man's own property must first be in imminent peril, there would be an end to all efficient efforts to stay the progress of a conflagration. I have no doubt the rule is otherwise. I think the second special plea is a good plea.

The replications I consider to be clearly bad. To both pleas they set up new facts, and in both cases they tender a traverse upon facts not set up or denied by the pleas. Looking, however, at the main point, which it is urged is presented by these replications, that the immediate destruction of the goods was not necessary, such defense is not set up in the pleas. The pleas are, in the one, that the buildings were lawfully, and in the other, that they were necessarily, destroyed in order to stop the progress of a conflagration, and that the destruction of the

goods was the unavoidable and inevitable consequence, there not being time to remove them. The lawfulness or the necessity to destroy the buildings should have been denied by a special traverse of some material fact upon which he relied to show that the buildings were so destroyed, or by setting up in the replication that the goods might have been removed. An issue upon either of these points, if decided in favor of the plaintiff, would be fatal to the defense. If the pleas are good, which I take them to be, the replications are bad.

I am of the opinion that the judgment below should be affirmed.

RANDOLPH, J., delivered a concurring opinion.

For affirmance, RANDOLPH and CARPENTER, Justices, and CORNELLION, VALENTINE, WILLS, RISLEY, and PORTER, Judges.

For reversal, HALSTED, Chancellor, and SCHENCK, Judge.

CONSTRUCTION OF STATUTE BY COURTS OF STATE ENACTING IT, FOLLOWED ELSEWHERE: *Case v. Cushman*, 39 Am. Dec. 47, and note collecting prior cases; but see *Hale v. Lawrence*, 47 Id. 190, where the principal case, as it first came before the court of errors and appeals of New Jersey, is reported. The principal case has been cited on this proposition in *Black v. Delaware & Raritan Canal Co.*, 22 N. J. Eq. 422; *Bloodgood v. Grasey*, 31 Ala. 589.

PUBLIC OFFICERS, WHEN PERSONALLY LIABLE FOR ACTS DONE BY THEM, IN GENERAL: See *Wilson v. Mayor etc. of New York*, 43 Am. Dec. 719, and note; *Teall v. Felton*, 49 Id. 352; *Stewart v. Southard*, Id. 463; *Town Council of Akron v. McComb*, 51 Id. 453; *Rochester White Lead Co. v. City of Rochester*, 53 Id. 316, and note; and in particular when the office is judicial or judicial and discretionary in its nature: See *Stone v. Graves*, 40 Id. 131; *Wilson v. Mayor etc. of New York*, 43 Id. 719; *Pratt v. Gardner*, 48 Id. 652, and notes to the various cases. A person is not liable as a wrong-doer when an act authorized by the legislature is done by him, the necessary and natural consequence of which is to damage another's property: *Aldrich v. Cheshire R. R.*, 53 Id. 212, and note.

LIABILITY FOR CONSEQUENTIAL INJURIES THROUGH WORK AUTHORIZED BY LAW: See *Rochester White Lead Co. v. City of Rochester*, 53 Am. Dec. 316; *Radcliff v. Mayor etc. of Brooklyn*, Id. 357, and notes to these cases.

PRIVATE PROPERTY WHEN MAY BE DESTROYED BY MUNICIPAL CORPORATIONS OR INDIVIDUALS: See *Hale v. Lawrence*, 47 Am. Dec. 190—the principal case as it formerly came before the court—and the note thereto; *Bishop v. Mayor etc. of Macon*, 50 Id. 400; and see *Noyes v. Shepherd*, Id. 625. The principal case was cited in *Harrison v. Wisdom*, 7 Heisk. 114, to the point that private property may be destroyed in a case of overruling public necessity; it is the exercise of a natural right belonging to every individual, not conferred by law, but tacitly exempted from human codes; but the ground of exemption from liability is that of necessity, and if property be destroyed without any apparent and reasonable necessity, the doers of the act will be held responsible: *Field v. City of Des Moines*, 39 Iowa, 578; the destruction

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of property under such circumstances is not the exercise of the right of eminent domain: *Id.* 577.

THE PRINCIPAL CASE WAS ALSO CITED in *Sadler v. Laugham*, 34 Ala. 332, to the point that so far as statutes assume to give authority to lay out private roads over the lands of another without his consent, they are unconstitutional; and in *Weller v. Snover*, 42 N. J. L. 344, the series of cases—*American Print Works v. Lawrence*, 1 Zab. 248, in the supreme court of New Jersey, *Hale v. Lawrence*, 47 Am. Dec. 190, and the principal case, in the court of appeals—were referred to as elaborately discussing the question whether the destruction of private property for public purposes is a taking for public use within the meaning of the constitutional prohibition of such taking without compensation.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

FIELD v. MAYOR ETC. OF NEW YORK.

[6 NEW YORK (2 SELDEN), 179.]

ASSIGNMENT OF DEMAND TO GROW DUE IN FUTURE; here, of money to be earned by performance of a contract for work and materials, though it can not operate immediately, becomes operative in equity when the subject-matter becomes existent or due.

ASSIGNMENTS OF CONTINGENT INTERESTS AND EXPECTATIONS, and of things having no present actual existence, but resting in possibility only, are valid in equity if fairly made and not opposed to any rule of public policy.

BILL IN EQUITY MAY BE MAINTAINED BY ASSIGNEE OR PART only of a demand, especially where there have been other assignments of other parts of the same demand to other persons.

NOTICE TO COMPTROLLER OF CITY OF NEW YORK, of a demand against the city, is notice to the corporation.

DEFENSE NOT SET UP IN ANSWER IS OF NO AVAIL.

APPEAL from a judgment of the supreme court reversing a vice-chancellor's decree. The suit was a bill in equity for an accounting, filed by Cyrus W. Field against the corporation of the city of New York and Jared W. Bell. It alleged that Bell had some time previously made an assignment to one Garread, of all bills that might become due to him for job printing, paper, or stationery done or furnished the corporation, to the amount of one thousand five hundred dollars, etc.; that Garread had assigned his interest to the complainant; that complainant had given notice to the city comptroller of the assignment; that Bell had since done printing for the corporation, for which money had become due to him from the city, with other facts usual and proper in a bill for an accounting; and it prayed

that an account might be taken and the city might be decreed to pay to complainant whatever sums (to the extent of one thousand five hundred dollars) might be found to have been earned by Bell. Other details are stated in the opinion. The defendant answered and the cause was heard before the assistant vice-chancellor on pleadings and proofs; but he dismissed the bill, holding, in an opinion not reported, that the assignment was good as a transfer of a possible right, but could not be enforced in equity unless some additional ground of equitable jurisdiction were alleged; also that notice to the comptroller was not notice to the city. The supreme court reversed this decree, and ordered an accounting; and on the coming in of the report, decreed that the city should pay one thousand five hundred dollars, with interest, to the complainant. From this decree the present appeal was taken.

A. J. Willard, for the appellants, the city.

Lorenzo B. Shepard, for appellant Bell.

Stephen J. Field, attorney, and *David Dudley Field*, of counsel, for the respondent.

By Court, WELLES, J. By the assignment from Bell to Garread, of March 14, 1842, it was intended to transfer to and vest in the latter the right and interest of the former in and to all the bills which might thereafter become due to him, from the corporation of the city of New York, for job printing, paper, or stationery done or furnished by Bell, either before or after the date of the assignment, to the amount of one thousand five hundred dollars; subject to the two prior assignments to Lloyd & Hopkins and to Coit. By the assignment from Garread to the respondent of April 28th, and the release from the former to the latter of December 27, 1842, the latter acquired all the right and interest of the former in the first assignment.

The case shows that at the time of the commencement of the suit in the court of chancery, bills of the description mentioned had become due from the corporation to Bell to an amount more than sufficient to satisfy all three of the assignments.

These bills appear to have accrued, and most of the services and materials upon which they arose appear to have been rendered and delivered, after the date of the assignment from Bell to Garread.

One of the questions presented by this appeal is, whether the court of chancery had jurisdiction to decree payment by the corporation of the city of New York, to the respondent, of his

claim. That it had such jurisdiction seems to be in accordance with reason and the theory of equity jurisprudence.

1. The assignment of Bell to Garread was valid and operative as an agreement, by which Garread and his assigns became entitled to receive payment of the bills in question when the same should become due, to the amount indicated in the assignment, subject to the two prior assignments. It did not operate as an assignment *in praesenti* of the choses in action, because they were not in existence, but remained in possibility merely—a possibility, however, which the parties to the agreement expected would, and which afterwards did in fact, ripen into an actual reality; upon which, by force of the agreement, an equitable title to the benefit of the bills thus mature and due became vested in the respondent as assignee of Garread: Story's Eq. Jur., secs. 1040, 1040 b, 1055; *Mitchell v. Winslow*, 2 Story, 630; *Langton v. Horton*, 1 Hare, 549.

It is contended by the counsel for the appellants that the assignment of Bell to Garread did not pass any interest which was the subject of an assignment, for the reason that there was no contract at the time between Bell and the corporation of the city, by which the latter was under any binding obligation to furnish the former with job printing, or to purchase of him paper or stationery; and that therefore the interest was of too uncertain and fleeting a character to pass by assignment. There was indeed no present, actual, potential existence of the thing to which the assignment or grant related, and therefore it could not and did not operate *eo instanti* to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did nevertheless create an equity, which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished. On this principle, an assignment of freight to be earned in future will be upheld, and enforced against the party from whom it becomes due. Story's Eq. Jur., sec. 1055, and authorities there cited; *Langton v. Horton*, and *Mitchell v. Winslow*, *supra*; Story on Bailments, sec. 294. Whatever doubts may have existed heretofore on this subject, the better opinion I think now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Authorities may be found which seem to incline the other way,

but which upon examination will be found to have been overruled, or to have turned upon the question of public policy.

2. A bill in equity was the proper remedy for the respondent in this case for the following reasons: 1. The nature of the claim is one peculiarly of equitable cognizance. It was an equity only in relation to things not yet in possession, or in being, in the nature of a lien, which must be enforced through judicial process before it could be enjoyed, and must therefore of necessity be adjudicated in a court of equity. If the claims of Bell against the city had accrued and been in being at the time of the assignment, and the assignment had been of any specific entire claim, and perhaps if it had been of all claims then due from the city to Bell, the remedy of Garread, his assignee, might, and perhaps in general must, have been at law. But all the cases where the contract has been in relation to things not in existence at the time, and which were in expectancy and possibility merely, show that their adjudication belongs exclusively to a court of equity. 2. But it seems to me that in this case, independently of the preceding considerations, there were insuperable difficulties in the way of sustaining an action at law. Such action must necessarily have been brought in the name of Bell, who had no interest until after all three of the assignments should be satisfied, of which the one to Garread was the last in the order of time, and was not to be satisfied until the others were provided for. I am aware that as a general rule the assignee of a chose in action may use the name of the assignor in an action at law to recover the amount. But it seems to me that the rule should be confined to cases where the whole of an entire demand is assigned to one person or party. Suppose A. has an entire demand of one thousand dollars against B., and assigns to C. one hundred dollars, to D. one hundred dollars, and to E. one hundred dollars, out of the one thousand dollars. Which of the three assignees shall institute an action against the debtor? Suppose we say C. shall have the right, how much shall he recover? Shall it be the one thousand dollars? Clearly it must be that, or the residue will be gone, because the demand can not be split, and several actions sustained for the several parts assigned. But C. has no right nor is he bound to litigate in relation to the parts assigned to D. and E., or that part not assigned at all. Here would be four parties, having separate and distinct interests, one having as good right to commence an action, to discontinue it, and to direct in relation to it as the other; and in case of disagreement,

who is to decide? In the case at bar, the plaintiff had no right to sue in Bell's name for what was to be paid under the two first assignments, nor for what would be going to Bell after all three were paid; and he could not carve out just one thousand five hundred dollars and the interest upon it, from the demands due from the city to Bell, without splitting entire demands, which can not be done: *Smith v. Jones*, 15 Johns. 229; *Guernsey v. Carver*, 8 Wend. 492 [24 Am. Dec. 60]; *Stevens v. Lockwood*, 13 Id. 644 [28 Am. Dec. 492]; Story's Eq. Jur., sec. 1250.

3. Notice of the respondent's rights was given to the comptroller of the city of New York before any payments were made by the city, of the bills in question; and the counsel for the city claim that the bills in question have all been paid either to Bell or to persons to whom he assigned them, other than the plaintiff; and insists that the corporation should be protected in such payments, on the ground that the notice to the comptroller was not notice to the corporation. To this the counsel for the respondent answers—1. That no such defense is taken in the answer put in by the corporation; and 2. That the notice to the comptroller was good notice to the city. Both these grounds, I think, are good, and either forms a sufficient answer to the position assumed by the counsel for the city: 1. Payment of the claims to any one was not alleged in the answer; it was a distinct, independent ground of defense, and should have been set up. 2. But if otherwise, the notice to the comptroller was sufficient.

The twenty-second section of the act to amend the charter of the city of New York, Sess. Laws of 1850, c. 122, provided that the executive business of the corporation should thereafter be performed by distinct departments, which it should be the duty of the common council to organize and appoint for that purpose. On the fourteenth of May, 1849, the common council passed an ordinance entitled an "ordinance concerning the department of finance." By section 1 of title 1 of that ordinance it is provided that "there shall continue to be an executive department under the denomination of 'the department of finance.'" By section 4 of the same title the "chief officer of the department shall be called 'the comptroller of the city of New York,' and shall have the superintendence of the same." Section 4 of title 2 defines the duty of the comptroller. By subdivision 6 of that section he is "to superintend all officers of the corporation who shall receive or disburse the public moneys of the city, or who are charged with the management or custody of its funds."

By other provisions of the ordinance, the comptroller is to settle and adjust all claims and demands whatsoever by or against the corporation: Tit. 1, sec. 3; all warrants on the treasury are to be signed by him, etc.: Sec. 6; he is to countersign bonds, etc.: Sec. 8; to examine, audit, adjust, and settle all accounts in which the corporation is concerned, etc.: Tit. 2, sec. 4, sub. 8; to draw and sign warrants on the chamberlain for moneys, etc.: Subd. 9 of last section.

The notice of the respondent's claims in this case, as appears from the evidence, was served upon the comptroller while in his office, engaged in the duties thereof, and was beyond all doubt sufficient: Angel & Ames on Corporations, 247.

Upon all the points raised upon the argument, therefore, I am of the opinion that the judgment of the supreme court ought to be affirmed.

JEWETT, J., did not hear the argument, and WATSON, J., gave no opinion.

Judgment affirmed.

ASSIGNMENT OF DEMAND TO BECOME DUE, VALIDITY OF: See *Payne v. Mayor etc. of Mobile*, 37 Am. Dec. 744; *Brackett v. Blake*, 41 Id. 442, and note. That an assignment of money to become due upon performance of an existing contract is valid in equity is held, citing the principal case, in *Hassie v. God is with Us Congregation*, 35 Cal. 388; *Hall v. Buffalo*, 2 Abb. App. Dec. 307; S. C., 1 Keyes, 199; *Power v. Alger*, 13 Abb. Pr. 475, note, per Hogeboom, J., dissenting; *Billings v. O'Brien*, 14 Abb. Pr., N. S., 246; S. C., 45 How. Pr. 400; *Devlin v. Mayor etc. of New York*, 50 Id. 1, 9; S. C., 63 N. Y. 15; *Greene v. Bartholomew*, 34 Ind. 235, 238; *Ruple v. Bindley*, 91 Pa. St. 299; *First National Bank v. Kimberlands*, 16 W. Va. 592. Thus an assignment of money to become due under a city contract is good: *Hall v. Buffalo*, 2 Abb. App. Dec. 307; S. C., 1 Keyes, 199; *Devlin v. Mayor etc. of New York*, 50 How. Pr. 1, 9; S. C. 63 N. Y. 15. So, generally, an assignment of unearned compensation or wages under an existing private contract: *Greene v. Bartholomew*, 34 Ind. 235, 238; *Billings v. O'Brien*, 14 Abb. Pr., N. S., 246; S. C., 45 How. Pr. 400. But in the latter case it is held that an assignment of the unearned salary of a public officer is not valid, on grounds of public policy. But in *Thurston v. Fairman*, 9 Hun, 585, and *People v. Dayton*, 50 How. Pr. 143, 149, it is decided that an assignment of unearned fees of a justice or other public officer is valid. And the general rule is that equity will uphold assignments, not only of choses in action, but of contingent interests and expectancies, and things having no present actual existence, but resting in possibility, if fairly made and not against public policy, and agreements for such interests will take effect as assignments, when the subjects assigned have ceased to rest in possibility and have ripened into reality: *Pierce v. Robinson*, 13 Cal. 123; *Bibend v. Liverpool etc. Ins. Co.*, 30 Id. 86; *Ely v. Cook*, 9 Abb. Pr. 376; S. C., 2 Hilt. 418; *Stover v. Eyclesheimer*, 4 Abb. App. Dec. 309, 312; S. C., 3 Keyes, 622; S. C. in supreme court, 46 Barb. 84, 91; *Seymour v. Canandaigua etc. R. R. Co.*, 25 Barb. 284, 306; S. C., 14 How. Pr. 531, 539; *Wood*

v. Lester, 29 Barb. 145, 154; *Union Mfg. Co. v. Lounsherry*, 41 N. Y. 374, *per Grover, J.*, dissenting; *East Lewisburg etc. Co. v. Marsh*, 91 Pa. St. 99; *Pennock v. Coe*, 23 How. 130; *Dunham v. Peru etc. R. Co.*, 1 Wall. 268; *Ellett v. Butt*, 1 Woods, 214, 218. Thus an assignment of the proceeds of future expected sales of goods is valid in equity: *East Lewisburg etc. Co. v. Marsh*, 91 Pa. St. 99. So an assignment of a patent not yet issued: *Goodyear v. Day*, 6 Duer, 161. So an assignment of costs not yet accrued in a pending suit: *Ely v. Cook*, 9 Abb. Pr. 377; S. C., 2 Hilt. 418. So an assignment of a right to insurance money under a policy before a loss has happened: *Bibend v. Liverpool etc. Ins. Co.*, 30 Cal. 86; *Bryson v. Builders' Ins. Co.*, 38 Id. 541, 545. So an assignment by a prospective heir of an anticipated interest in the estate of a living ancestor: *Stover v. Eyclesheimer*, 46 Barb. 84, 91; S. C. in court of appeals, 4 Abb. App. Dec. 309, 312; 3 Keyes, 622. See generally, as to sales and conveyances of expectancies, the note to *Trull v. Eastman*, 37 Am. Dec. 128. So an assignment of an equitable remainder is good in equity: *Wood v. Mather*, 38 Barb. 482. So a mortgage of wood to be cut or of crops to be raised is held valid in equity, in *Ellett v. Butt*, 1 Woods, 214, 218; *Wood v. Lester*, 29 Barb. 145, 154. Or a mortgage of a railroad "to be constructed": *Dunham v. Peru etc. R. Co.*, 1 Wall. 268; *Seymour v. Canandaigua etc. R. R. Co.*, 25 Barb. 284, 306; S. C., 14 How. Pr. 531, 539. See further, as to mortgages of after-acquired property, *Moody v. Wright*, 46 Am. Dec. 712.

ASSIGNMENT OF PART OF ENTIRE DEMAND, VALIDITY OF: See *Palmer v. Merrill*, 52 Am. Dec. 782; *Gallinger v. Pomeroy*, 54 Id. 496, and notes. That such an assignment though void in law is valid in equity is a point on which the principal case is cited with approval in *Risley v. Phenix Bank*, 83 N. Y. 329; *Trist v. Child*, 21 Wall. 447; *Gram v. Aldrich*, 38 Cal. 514, 521; *First National Bank v. Kimberlands*, 16 W. Va. 590. The case is cited to the same point in *Ruple v. Bindley*, 91 Pa. St. 299, but it is held unnecessary to decide whether this is so in Pennsylvania.

SUCH EQUITABLE ASSIGNMENT MAY BE MADE BY ORDER on the person holding the fund, and will be valid *pro tanto* upon notice being given to such party without formal acceptance by him: *Gram v. Aldrich*, 38 Cal. 514, 521; *Ballow v. Boland*, 14 Hun, 359; *Alger v. Scott*, 54 N. Y. 16, *per Earl, C.*, dissenting; *Shaver v. Western Union Tel. Co.*, 57 Id. 472; *People v. Comptroller*, 77 Id. 48; *First National Bank v. Kimberlands*, 16 W. Va. 590. So though, as in the principal case, the fund is not in actual existence at the time of the order: *Risley v. Smith*, 7 Jones & S. 150. But notice is necessary to bind the drawee of such an order, and until such notice he may treat the assignor as the owner of the entire fund and discharge himself by payment to him: *Heermans v. Ellsworth*, 3 Hun, 475; S. C., 5 Thomp. & C. 607; S. C., affirmed in court of appeals, 64 N. Y. 161. And a draft or order will not operate as an assignment of part or all of the fund on which it is drawn, as against the drawee without acceptance, unless it specifies the fund: *Hutter v. Ellwanger*, 4 Lans. 8, 13. For as shown in *Chapman v. White*, *post*, p. 464, and note, acceptance is essential to create a liability from the drawee to the holder of a check, bill of exchange, or draft drawn upon a party generally, not specifying any particular fund. And it is held that an order made payable "at time of completion and acceptance of contract," with a direction to charge to the drawer's account, does not sufficiently specify the fund to operate as an equitable assignment, although the only liability existing in favor of the drawer against the drawee is for moneys growing out of a particular contract, and although the drawer intended to charge that fund: *Hutter v. Ellwanger*, 4 Lans. 8, 13. See further, as to when an order drawn upon a party will or will not operate as an assign-

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ment of a fund in his hands, *Alexander v. Adams*, 47 Am. Dec. 547; *Chapman v. White*, post, p. 464, and notes thereto.

DELIVERY OF ORDER TO COMPTROLLER IS SUFFICIENT NOTICE to the city of which he is officer to constitute an assignment of a demand against such city, if the delivery is not qualified: *Parker v. Syracuse*, 31 N. Y. 379, citing the principal case. See generally, as to the sufficiency of notice to an officer or agent of a corporation as notice to the corporation, the note to *Bank of Pittsburgh v. Whitehead*, 36 Am. Dec. 188.

RIGHT OF ASSIGNEE OR CHOSE TO MAINTAIN BILL IN EQUITY to enforce his claim: See *Moor v. Veazie*, 52 Am. Dec. 655; *Hopkins v. Hopkins*, 53 Id. 663.

DEFENSE NOT PLEADED IS DEEMED WAIVED: *Stewart v. Preston*, 44 Am. Dec. 621. That a defense not pleaded is not available to the defendant, though proved, is a point to which the principal case is cited in *Robbins v. Richardson*, 2 Bosw. 256; *Williams v. Birch*, 6 Id. 678; *Star Fire Ins. Co. v. Palmer*, 9 Jones & S. 273. So, generally, that facts proved, but not pleaded by either party, are not available to him: *Anonymous*, 15 Abb. Pr. 176; S. C., 2 Thomp. & C. 561; *New York etc. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 473; *Allen v. Mercantile etc. Ins. Co.*, 46 Id. 656; *Chautauque County Bank v. White*, *infra*, and note. Nor is evidence of facts not pleaded admissible either for the plaintiff or for the defendant: *Brackett v. Wilkinson*, 13 How. Pr. 103; *Button v. McCauley*, 38 Barb. 415. But it is held in *Barnes v. Perine*, 12 N. Y. 31, and *Voorhees v. Burchard*, 55 Id. 104, that under the code, the objection that facts proved were not pleaded, if not taken at the trial so as to give opportunity for amendment, can not be taken advantage of on review, distinguishing the principal case. It is held, also, in *Richards v. Allen*, 3 E. D. Smith, 407, that the rule of the principal case on this point does not apply where the answer, though defective, gives notice of the defense sought to be made available under it.

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[*6 NEW YORK (2 SELDEN)*, 238.]

DECREE IN CREDITOR'S SUIT BROUGHT TO SET ASIDE ASSIGNMENT OF REALTY for fraud against creditors is not limited to adjudging the assignment void, but may order the debtor and his fraudulent assignee to convey the lands to a receiver; and such receiver may be, in due course, empowered to sell for complainant's benefit.

JUDGMENT AGAINST DEBTOR DOCKETED AFTER ASSIGNMENT TO RECEIVER, pursuant to an order of court in a creditor's suit, of land alleged to have been fraudulently conveyed away by such debtor, is not a lien thereon.

PARTICULAR DESCRIPTION OF LAND IN ASSIGNMENT TO RECEIVER pursuant to an order of court in a creditor's suit to set aside a fraudulent conveyance is unnecessary, but a description in general terms of all the debtor's personal and real property is sufficient.

EXECUTION MUST BE RETURNED UNSATISFIED BEFORE CREDITOR'S BILL can be filed under 2 N. Y. R. S., secs. 38, 39, to compel a discovery of a judgment debtor's property, but those sections do not affect the common law powers of a court of chancery as to fraudulent trusts and conveyances.

and a judgment creditor may, independently of the statute, maintain a bill to set aside a fraudulent conveyance by his debtor, although he may also have a legal remedy by levy and sale. *Per Gardiner, J.*

PURCHASE OF LAND AT RECEIVER'S SALE is not rendered void by the facts that the purchaser was an attorney prosecuting the suit in which the receiver was appointed, and that the sale was for an inadequate price, influenced by erroneous (not fraudulent) representations by such attorney; objections of this kind must be raised by motion to set aside the sale.

PARTY IS NOT ESTOPPED BY EXPRESSING HONEST BUT MISTAKEN OPINION on a question of law; as that a certain judgment is a lien upon land claimed by him, especially where the statement was not made in the presence of the person claiming the estoppel

APPEAL from a judgment of the supreme court, reversing a vice-chancellor's decree. The litigation arose out of a general assignment made by Saxton, of all his property, for benefit of creditors; the bank, complainant in this suit, being a preferred creditor of the first class. Creditors who were not preferred in the first class brought a suit in the former court of chancery to have the assignment annulled for fraud against creditors; and the court made a decree declaring the assignment void, and directing that a receiver be appointed with the usual powers and authority; and that Saxton and the assignees should assign, convey, and deliver to him all the assigned assets, etc. Saxton and the assignees made such transfers; which, however, did not particularly describe the property. Meantime, also, other creditors of Saxton, who were not preferred to their satisfaction in his assignment, came forward and joined in the litigation. Thereafter an order was made directing the receiver to sell the real estate thus assigned to him, subject to the liens and incumbrances thereon, and to apply the proceeds to the satisfaction of the demands established by the various creditors, in the order in which their bills had been filed. The receiver advertised a sale, the same to be for cash, and subject to liens, etc. A sale was made, the purchaser being the solicitor for the various creditors who came into the litigation after it had been commenced. The proceedings at the sale and the small price realized were apparently influenced by statements made by the solicitor, overestimating the number and amount of the various judgments which would be liens on the property. The bank meantime procured a sale of the property on execution, and bought it in. To render this purchase available, the bank brought this suit, praying that their judgment might be decreed to be a lien from the time when docketed; that their title under the sheriff's sale might be declared superior to the defendant's title under the receiver's sale; and that the defendant might be adjudged to

surrender possession of the lands, and account for the rents and profits, to the bank. The defendant asserted the regularity and validity of the receiver's sale, and claimed protection as a *bona fide* purchaser for value. The vice-chancellor dismissed the bill; the supreme court reversed his decision; and the bank appealed.

William Curtis Noyes, for the appellants.

Chauncey Tucker, for the respondent.

By Court, GARDINER, J. (after stating the facts). The important question in the cause is, whether the conveyance by Saxton to the receiver, on the fifth of January, 1839, divested the grantor of his interest in the real estate in question, so that no lien was acquired by the plaintiffs under their judgment subsequently docketed.

Were it not for the elaborate opinion of the learned judge who delivered the judgment of the supreme court, I should deem the interrogatory satisfactorily answered in the affirmative by the preceding statement of facts.

The statute declares "that a judgment of a court of record shall bind the real estate of the debtor, which he may have at the time of the docketing of the judgment." In this case, the assignment of Saxton, the debtor, of all his real estate, was made to the receiver on the fifth of January, 1839, and the question is, what he had remaining to subject to a lien of the plaintiffs' judgment, obtained two days afterwards.

If the assignment and trust deed to Crane and Crosby were operative, the legal title was in them as assignees. If fraudulent and consequently void, as the plaintiffs assume, and as the court of chancery had decreed when they directed the appointment of a receiver, then the conveyance by Saxton to the latter, under the order of the court, divested him of all his property (except that exempted from execution), the premises in question inclusive.

The power of the court to make the order of November, 1838, is not questioned. The supreme court admit that the conveyance to the receiver is in form sufficient to transfer the title, and that in terms it is in conformity with the order. It is said that Lester was a common-law receiver. But such a receiver may be, and in this case was, specially authorized to receive what the judgment debtor was directed to transfer and assign. The subject of the transfer was "all the property, rents, and real estate" of Saxton, as provided by the decree, and enumerated in the assignment. We are told "that the effect of the

words 'assign and transfer' depends upon the intent; and the intent was to convey to the receiver just interest enough in the property to enable him to protect it, and receive the rents and profits." This is the view taken by the court below. We are not informed what would be the nature of that partial interest, which, when conveyed, would enable the receiver to acquire possession of and protect the real estate, and yet leave a residuum in the grantor upon which the judgment of the plaintiff would be a lien. The adjudication of the court, and the intention of the chancellor, are to be ascertained from the record. And on examining the decree, we find no allusion to an undefined interest, which is not a legal one, but which will, notwithstanding, give the possession of the lands, and a title to receive the profits, and guard both against all persons whatsoever; but it is there "adjudged and decreed that the defendant Saxton shall assign, transfer, and set over all the things in action, equitable interests, rents, and real estate, which were in his possession, custody, or control at the time of the service of the injunction." As against the complainants in that suit, the debtor had neither parted with the possession, title, nor control of any of his property by the fraudulent assignment. The decree places all of it, things in action and real estate, upon the same footing, as to the quantity of interest to be conveyed; and a limitation as to one in this respect is applicable to both or neither. The assignees are also required to convey to the same person, obviously manifesting the intention of the court, that the receiver should be clothed, not only with the substantial, but also with the formal title to the entire property.

If this is the true construction of the decree, it disposes of this controversy. The lien of the plaintiffs' judgment never attached upon the premises; the subsequent sale was inoperative, and conferred no title upon them as purchasers. To this result, it is immaterial whether the object of the assignment to the receiver was merely to protect the property and collect the rents, since the court has determined that the transfer of the whole interest was necessary to enable the officer to discharge those duties.

That decision can not be reviewed here, and is conclusive in this case. Nor is it material whether chancery could decree a satisfaction of the demands of judgment creditors out of the real estate. If the chancellor, in this particular, exceeded his jurisdiction, the sale might be void; but the title of the receiver under the assignment would not be affected. The case made by

the plaintiffs assumes the validity of that transfer, and predicates their title to relief upon the sole ground of a legal lien and sale by virtue of their judgment. The difference between the parties to this suit is not as to the jurisdiction of chancery to make the order of November, 1838, but as to its construction. The bill, in its frame and parties, can be sustained upon no other ground.

But in the second place, the court of chancery had authority, under the circumstances of this case, to decree a sale of the real estate. The provisions of 2 R. S. 174, secs. 38, 39, apply to creditors' bills, strictly so called, where the only claim to relief is, that the remedy of the creditor is exhausted at law. In those cases an execution must be returned unsatisfied, and this alone confers jurisdiction upon the court to compel a discovery and afford the relief mentioned in the thirty-ninth section. The common-law powers of the court, in reference to fraudulent trusts and conveyances, are not touched by these provisions. Fraud and trust were familiar heads of equity jurisdiction, independent of the statute. The creditor, invoking the aid of the court, must establish his title to its interposition by alleging a lien, or *quasi* lien, upon the real or personal property which was the subject of the trust; and he would then be entitled to relief, notwithstanding he had a remedy at law, by levy and sale upon execution. In all cases of fraudulent trusts the court may in its discretion direct a sale by a master, and compel the debtor and trustee to unite in the conveyance to the purchaser; or it may order an assignment to a receiver, as was done in this case, to the end that the property may be disposed of under the special instructions of the chancellor; or the fraudulent conveyance may be annulled and the creditor permitted to proceed to a sale upon his execution: *McElwain v. Yardley*, 9 Wend. 548; *Reade v. Livingston*, 3 Johns. Ch. 507 [8 Am. Dec. 520]; *Stileman v. Ashdown*, 2 Atk. 477; *Edgell v. Haywood*, 3 Id. 357; *Edmeston v. Lyde*, 1 Paige, 642 [19 Am. Dec. 454]; *Le Roy v. Rogers*, 3 Id. 235, 237.

The authorities cited by the plaintiffs assert or imply these principles. Indeed, their counsel was understood as conceding substantially the jurisdiction of the court by the common law; but claimed that it had been limited to sales of personal property, in satisfaction of the judgment, in all cases by statute. In this I think he is mistaken; and in *Le Roy v. Rogers*, 3 Paige, 237, the chancellor seems to have been of the same opinion.

It is said that the defendant is estopped from alleging that the plaintiff's judgment is not a lien, because he asserted the

contrary before his purchase at the receiver's sale. The defendant, in his letter to the receiver, of the fourth of April, 1840, insisted that the real estate would be worth nothing above the judgments that were liens upon it. And he probably expressed the same opinion to the receiver at the sale; but not in the presence of the purchasers. I assume, however, that he informed the receiver that this judgment was a lien upon the premises. The complainants do not allege that he was influenced by improper motives in making the declaration, or that it was not at the time the opinion honestly entertained by him. The estoppel, then, consists in the expression of an opinion upon a question which the complainants will claim is not free from difficulty, and in subsequently changing it. The opinion not being declared to the complainants, who do not claim in their bill that they did or omitted anything upon the faith of it; or, indeed, that they knew it was entertained by any one, until subsequent to the disposition of the property in question.

An honest though mistaken opinion of the law would be a singular estoppel. Even a lawyer may increase his knowledge as to his legal rights without forfeiting his estate on account of his former ignorance.

The decree should be reversed, with costs in the supreme court.

GRIDLEY, J., after stating the leading facts of the case, proceeded as follows: The plaintiffs, by their bill, prayed that their judgment of January 7, 1839, might be decreed to be a lien on the real estate conveyed by the receiver to the defendant, and that the title claimed under the sheriff's sale might be decreed to be superior to that claimed under the receiver's sale, and for such other relief as might be agreeable to equity. The original owner made an assignment to the receiver for the benefit of creditors, on the fifth day of January, 1839. And if that conveyance was authorized by the law of the land and the practice of the court of chancery, and if, upon a just construction, it embraced the premises in question, then the judgment of the plaintiffs was never a lien on those premises.

The plaintiffs' counsel contends that neither of these positions is true. I am of the opinion, however, 1. That the deed executed by Saxton, the judgment debtor, does embrace the real estate in question. The assignment was executed in pursuance of an order of the court of chancery, made on the first day of November, 1838, which directed an assignment of all the money, equitable interests, property, things in action, rents, real estate, and effects of the said Saxton, in his possession or

under his control, when the injunction was served. The deed itself purports to convey to the receiver all the money, equitable interest, property, things in action, real estate, and effects of the said Saxton, according to said order. This conveyance is adjudged in the final decree to pass the real estate of said Saxton, and by that decree the receiver is directed to sell the same, and to execute a conveyance thereof to the purchaser. The description of the property in the assignment is such as is adequate to convey real estate by such an instrument: *Roseboom v. Mosher*, 2 Denio, 61; *Ward v. Van Bokkelen*, 2 Paige, 297; *Bayard v. Hoffman*, 4 Johns. Ch. 450. Now if this assignment contained adequate and appropriate words to convey the real estate, and the said real estate was so conveyed in pursuance of an order of the court, and sold by the receiver, under a valid decree of the court of chancery, then it does not matter that it was not according to the practice of the court, to order real estate to be conveyed. The order or decree, under which this deed was executed, was granted in a suit against Saxton, and the assignees. The assignees in that suit represented the plaintiff and all other creditors who were preferred in the assignment; and the acquiescence of the defendant, Saxton, and the assignees, in the order and decree in question, is binding equally on them, and on all who claim under or through them; and although that order may have been too broad and extensive, and therefore erroneous or irregular, yet it was not void, and can not be questioned in a collateral suit. I say it was not void, because the court had jurisdiction of the parties and of the subject-matter; so that any decree affecting the real estate would not be void, though it might be erroneous. My views of the original object of a creditor's bill are expressed in the case of *Scouton v. Bender*, 3 How. Pr. 185. The cases of *Tompkins v. Fonda*, 4 Paige, 448; *Le Roy v. Rogers*, 3 Id. 234; and 2 Hoff. Ch. Pr. 115, are also authorities on the same subject. But it is said in *Scouton v. Bender*, *supra*, that "when the judgment debtor has assigned to a receiver his real as well as his personal estate, for the benefit of the prosecuting creditor, and the court has removed the fraudulent deed that covered it, and when all the parties who have acquired any lien upon it are before the court, we can see no objections to a sale by the receiver and a distribution of the proceeds among the creditors according to the priority of their liens. The court of chancery having obtained jurisdiction of the case and the subject-matter of it, for one purpose, may retain it in order to do full justice to all the

parties to the suit. Such a sale, however, can not affect the rights of a senior judgment creditor."

We have already seen that the plaintiffs' title was derived under a judgment junior to the title of the receiver. Now, though we might think that it was not the original object of a creditor's bill to reach the real estate of a debtor, and that in a case where a bill is filed to set aside an assignment or to remove any other fraudulent obstruction the object of the bill is compassed when the fraudulent obstruction is removed so as to leave the property subject to an execution at law; yet, when a court does authorize a receiver to sell real estate that has been assigned to him under an order of the court, no lawyer will question the power of the court to do this, or dispute the validity of a title derived under such a sale. It has been the practice of the court to order real estate to be sold so long and so extensively that it seems too late to question the power and jurisdiction of the court to order the sale of real estate, under a creditor's bill, which also seeks to set aside a fraudulent conveyance as a part of the complainant's relief. In England, as well as in this state, the court of chancery has often exercised the power to order real estate to be sold. The following are some of the authorities on this point: *Edgell v. Haywood*, 3 Atk. 352; *Holme v. Stanley*, 8 Ves. 1; 1 Daniell's Ch. Pr. 411; *Stileman v. Ashdown*, 2 Atk. 477; *O'Gorman v. Comyn*, 2 Sch. & Lef. 150; *Sands v. Codwise*, 4 Johns. 536 [4 Am. Dec. 305]; *Reade v. Livingston*, 3 Johns. Ch. 481 [8 Am. Dec. 520]; *Edmeston v. Lyde*, 1 Paige, 637 [19 Am. Dec. 454]; *Bank of United States v. Housman*, 6 Id. 526, 539; *Iddings v. Bruen*, 4 Sandf. Ch. 417; *Ludlow v. Lansing*, Hopk. 231; [miscited] 2 Barb. Ch. 233.

2. But suppose that I am wrong in the conclusion that the order of the court authorized, or the language of the assignment warranted, the construction which I have assigned to it, and that I have attached too much importance to the final decree, as settling the construction of the conveyance to the receiver, and rendering the sale by him lawful. Suppose the receiver was only vested with the power of a common-law receiver, and had no control over the lands of the judgment debtor, and no right to sell them. Upon what ground has the plaintiff invoked the aid of this court? A court of law was just as competent to give a correct construction to this deed as the court of chancery. And as no discovery was sought, the remedy was purely legal, and should have been sought in a court of law; and inasmuch as this objection was distinctly

taken in the answer, it should now be held fatal. An action of ejectment was the proper mode of determining the construction of the deed to the receiver; and the fact that the receiver had conveyed to the purchaser would not entitle the plaintiffs to set aside the deed as a cloud on their title. The power to sell appears on the face of the deed, and in the decree and order of the court of chancery; and might as well be disposed of in a court of law as chancery. This point was decided in *Cox v. Clift*, 2 N. Y. 118; S. C., 3 Barb. 481; and *Van Doren v. Mayor of New York*, 9 Paige, 388, where bills were dismissed for a similar reason.

3. It is said that the sale was not authorized, for the reason that the receiver had personal property enough to pay the judgment in favor of Webb & Douglass. I am not certain that this allegation is true, but if it should be admitted to be so, the receiver held the real estate for the creditors in all the other suits in which he had been appointed, and could sell to satisfy those judgments.

4. It is said, again, that the sale was for a grossly inadequate price; and was made under fraudulent representations of the defendant to the receiver; and that the receiver was guilty of collusion and highly improper conduct in the sale. These facts, if admitted, may have furnished good reasons for setting the sale aside, on motion of a proper party; but if a suit could be prosecuted in chancery to effect that object, most clearly the receiver should have been a party defendant. The charge affects him in every aspect of it; and he was entitled to be brought into court, and to have an opportunity to defend himself against these charges. Besides, the plaintiffs do not, in their bill, show that they are entitled to this relief, as they have themselves purchased the property in question at sheriff's sale, and the *gravamen* of their bill is, that they have a good title to the premises, and that the defendant has received a deed for the same premises under the receiver's sale, which the court of chancery was asked to set aside. Besides, it appears that they were not present at the sale, and could not be damnedified by the representations there made.

The decree of the supreme court should be reversed, and that of the vice-chancellor affirmed, with costs in the courts below.

Ordered accordingly.

APPOINTMENT AND POWERS OF RECEIVER IN CREDITORS' SUIT TO AVOID FRAUDULENT CONVEYANCE.—That a court of chancery has, independently of any statute, power to appoint a receiver in a suit brought by a judgment

creditor to set aside a fraudulent conveyance by his debtor, and may require the debtor and his fraudulent grantee to assign or convey to the receiver and direct the receiver to sell and convey the property, is a doctrine for which the principal case is cited and approved as authority in *Walker v. White*, 36 Barb. 598; *Van Wyck v. Baker*, 10 Hun, 40; *Union National Bank v. Warner*, 12 Id. 309; *Chautauque Co. Bank v. Risley*, 19 N. Y. 374; *Gunn v. Blair*, 9 Wjs. 361. Directing a sale by a referee, after setting aside the impeached conveyance, is erroneous: *Union National Bank v. Warner*, 12 Hun, 309. In *Dawley v. Brown*, 65 Barb. 119, it is held that a case of a fraudulent conveyance of land by a debtor, which has been set aside by reason of the fraud, is not one of those in which a court of chancery may decree a sale and conveyance of the land by a master, without requiring the debtor to join in the conveyance or to convey to a receiver. When the fraudulent conveyance is set aside, the title is in the debtor, and can be passed only by his deed or by a sale on execution: *Van Wyck v. Baker*, 10 Hun, 40. Independently of the statute, a common-law receiver did not take the title to a debtor's estate by virtue of his appointment nor under an ordinary assignment, but only where the debtor conveyed to the receiver under an order of the court: *Wing v. Disse*, 15 Id. 194. So in *Livingstone v. Arnoux*, 15 Abb. Pr., N. S., 162, it is held, citing the principal case, that in an action by creditor's bill, as authorized by 2 R. S. 174, sec. 39, the old court of chancery was not authorized to sequester the debtor's title to land and vest it in a receiver, or confer on him any but the powers of a common-law receiver, and could not supersede the necessity of a sale on execution nor deprive the debtor of his statutory right of redemption. But where a debtor does make an assignment or conveyance to the receiver, under the order of the court, of property previously fraudulently transferred, the receiver takes the title, and the same rule applies to a receiver in proceedings supplemental to execution under the code: *Potter v. Clark*, 12 How. Pr. 107; S. C., *sub nom. Porter v. Williams*, 9 N. Y. 151. Such a receiver may, therefore, maintain a suit to set aside a fraudulent conveyance by the debtor: *Id.*; *Hayner v. James*, 17 Id. 333. Receivers in proceedings supplemental to execution, like receivers in creditors' suits to avoid fraudulent conveyances, are trustees for and represent all the creditors as well as the debtor: *Kennedy v. Thorp*, 3 Abb. Pr., N. S., 134; S. C., 2 Daly, 260; *Bostwick v. Beizer*, 10 Abb. Pr. 198. And such a receiver must administer the whole estate coming to his hands under the direction of the court for the benefit of all parties, first discharging those debts which have acquired an equitable preference: *Bostwick v. Beizer*, *supra*. In all the foregoing decisions the principal case is cited as authority. It is cited also in *Thompson v. Sherrard*, 35 Barb. 594; S. C., 22 How. Pr. 157; S. C., 12 Abb. Pr. 432, where it is held that in an action for the recovery of real property, with damages for wrongfully withholding it, a receiver of the rents and profits can not be appointed.

WHETHER CREDITOR MUST EXHAUST LEGAL REMEDY BEFORE FILING BILL to reach equitable assets of his debtor, or to set aside a fraudulent conveyance by procuring judgment and having execution issued and returned unsatisfied, see *Comstock v. Rayford*, 40 Am. Dec. 102; *Miller v. Davidson*, 44 Id. 715, and the note to the latter case. To authorize the filing of a creditor's bill strictly so called under the sections of the New York revised statutes, referred to in the principal case, the creditor must not only have judgment, but must show execution issued and returned unsatisfied, for the jurisdiction depends upon it: *McCaffrey v. Hickey*, 66 Barb. 491. But those statutory provisions apply only to strict creditors' bills, and do not touch

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the common-law power of a court of chancery to entertain a creditor's suit to set aside a fraudulent conveyance by a debtor: *Fassett v. Tallmadge*, 18 Abb. Pr. 59; *Lawrence v. Bank of Republic*, 3 Robt. 155; *Adeit v. Sanford*, 23 Hun, 47. That a creditor may, even without having obtained judgment, maintain a bill to reach property fraudulently transferred by his debtor, where such creditor is otherwise remediless, is held, citing the principal case, in *Kamp v. Kamp*, 46 How. Pr. 147; *Spicer v. Ayers*, 2 Thomp. & C. 628; *Chillingworth v. Freeman*, 67 Barb. 381. That a creditor having obtained judgment may maintain such a bill, though he has also a remedy by execution, and without showing an execution returned unsatisfied, is a point to which the principal case is cited in *Fassett v. Tallmadge*, 18 Abb. Pr. 59; *Gillet v. Staples*, 16 Hun, 588; *Payne v. Sheldon*, 63 Barb. 175. But while it is conceded in *Adeit v. Sanford*, 23 Hun, 47, that the sections of the revised statutes mentioned in the opinion do not apply to a bill by a creditor to set aside his debtor's fraudulent conveyance, yet it is held that to maintain such a bill an allegation of the issuance of execution and its return unsatisfied is necessary, independently of any statute. Such an allegation is held necessary also in *McCullough v. Colby*, 5 Bosw. 498, and the intimations in the principal case to the contrary are said to be mere dicta; and the case is further distinguished on the ground that the transfer included both the personality and the realty of the debtor. In *Shaw v. Dwight*, 27 N. Y. 253, it is held, citing *Chautauque Co. Bank v. White*, that a creditor having a judgment which is a lien on land fraudulently transferred by his debtor may either sell it on execution, or have his execution returned unsatisfied, and maintain a bill to subject the land to the payment of the judgment.

THAT ENGLISH COURT OF CHANCERY HAS POWER TO DECREE SALE OF LAND by a master, and to vest title in the purchaser by the master's deed, is a point to which the principal case is cited in *Dawley v. Brown*, 65 Barb. 118. So, generally, that courts of equity have original and inherent authority to decree the performance of obligations springing from valid and effectual trusts: *McCartney v. Bostwick*, 32 N. Y. 60.

JUDGMENT RECOVERED AND DOCKETED AGAINST GRANTOR IN TRUST DEED, after the execution of such deed, is not a lien on the land conveyed thereby: *Schroeder v. Gurney*, 10 Hun, 418, citing *Chautauque Co. Bank v. White*.

ESTOPPEL BY REPRESENTATIONS, SILENCE, ETC.: See *Carter v. Darby*, 50 Am. Dec. 156; *Danley v. Rector*, Id. 242; *Alexander v. Walter*, Id. 688; *Mitchell v. Zimmerman*, 51 Id. 717; *Smith v. Mundy*, 52 Id. 221; *Pierce v. Andrews*, Id. 748; *McMahan v. McMahan*, 53 Id. 481; *McCravey v. Remson*, 54 Id. 194; *Taylor v. Zepp*, 55 Id. 113; *Hughes v. McAlister*, Id. 143, and cases collected in the notes thereto. An admission or misrepresentation made by mistake is no estoppel: *Stuart v. Luddington*, 10 Id. 550; *Brewer v. Boston etc. R. R. Co.*, 39 Id. 694. So silence as to one's rights through ignorance works no estoppel: *Morrison v. Caldwell*, 17 Id. 84. As to when a representation that land is subject to execution, when it is not, constitutes no estoppel, see *Smith v. Mundy*, 52 Id. 221. An act or representation, or an omission to act or make a disclosure, constitutes no estoppel unless adapted and intended to induce a party to adopt a course of conduct which would be prejudicial to him if such estoppel were not allowed, nor unless such course of conduct was actually adopted by the party under the influence of such act, representation, or omission: *Christianson v. Linford*, 3 Robt. 224; *Eitel v. Bracken*, 6 Jones & S. 15, citing the principal case. See also cases in this series above referred to. The mere expression of an erroneous opinion upon a matter of law raises no estoppel: *Tilton v. Nelson*, 27 Barb. 607, citing and commenting on the principal case.

MATTER NOT PLEADED, WHETHER ADMISSIBLE in evidence as a cause of action or defense: See *West v. McConnell*, 25 Am. Dec. 191, and *Field v. Mayor etc. of New York, ante*, p. 435, and note. That a judgment creditor seeking to charge property of his debtor conveyed in trust for creditors can not claim that the deed was fraudulent and void because made to hinder, delay, and defraud creditors, where that fact is not alleged, that no evidence of such fact is admissible, and that no judgment can be founded on it, is held, citing the principal case, in *Rome Exchange Bank v. Eames*, 4 Abb. App. Dec. 88; S. C., 1 Keyes, 592.

CORWIN v. CORWIN.

[*S. New York (2 Selden)*, 242.]

CONVEYANCE TO SON-IN-LAW "IN CONSIDERATION OF NATURAL LOVE AND AFFECTION," etc., is not good as a deed of bargain and sale, because it shows no pecuniary consideration; nor as a covenant to stand seized, because affinity by marriage is not a sufficient consideration for such a covenant.

APPEAL from a judgment affirming a judgment for defendant on demurrer. The action was brought to recover specific real property. There was no dispute that the land formerly belonged to one Tuthill. His daughter became the wife of Jabez Corwin, sen.; bore him a son, also named Jabez Corwin, the defendant, and died. During the marriage relation Tuthill deeded the land to Jabez Corwin, sen., the daughter's husband. After her death her husband married again, and the plaintiffs, Franklin E. and Ira C. Corwin, were his sons by the second marriage. Later still, Jabez Corwin died; by which event, if the deed from Tuthill to him was a valid conveyance, all his children inherited the land in equal shares. The object of the action was to establish his title, and to recover two shares of the land as the property of the two sons who brought the suit. The position of the defendant son appears to have been that if the deed from Tuthill to his father was void, the land belonged wholly to him as the direct heir (grandson) of Tuthill. No necessity arose in the suit, however, for his disclosing title; he was in possession, and his answer, without asserting other right than that set out in the deed given by his grandfather, alleged that under this deed his father took possession, and that it was the only muniment of title under which his half-brothers, the plaintiffs, could claim, and charged that it was void. The deed, which was in form of bargain and sale, with covenant of warranty, purported to be made "for and in consideration of natural love and affection which I have and do bear unto my son-in-law, Jabez Corwin, and for the better maintenance and

livelihood of him, the said Jabez Corwin." The plaintiffs demurred to the answer, relying on the insufficiency of such a conveyance, and the demurrer was sustained at the special term on the two grounds that the deed might be treated as a covenant to stand seised, and that Jabez Corwin had acquired title by adverse possession; and by the general term on the latter ground. Both opinions are reported in 9 Barb. 219. The defendant appealed.

Nicholas Hill, jun., for the appellant.

William M. Allen, for the respondents.

By Court, JOHNSON, J. The defendant's answer sets up the facts on which, as he alleges, the question of the plaintiffs' title depends. To this answer the plaintiffs have demurred, and thereby admitted the truth of the facts stated. The answer does not allege that Jabez Corwin was ever in possession of the lands in question between the date of the deed to him and the death of the grantor in the deed, on which latter event he became entitled to the possession of the land as tenant by the courtesy initiate. He does not therefore appear to have been in possession under his deed at any time. There being neither livery of seisin nor possession under the deed, the plaintiffs fail to make out a title in Jabez Corwin, sen., unless the deed can be sustained as a conveyance under the statute of uses. It has been contended that it operates either as a bargain and sale or as a covenant to stand seised. It can not operate in the first way, because it shows no pecuniary consideration; nor in the second, because affinity by marriage is not a consideration on which a covenant to stand seised can be maintained. Of course, I do not speak of a deed in consideration of marriage properly speaking; viz., of marriage to be had. This is a valuable consideration. We do not intend to be understood as expressing any opinion upon the effect (should the plaintiffs obtain leave to reply in the court below) of adding to the case an averment in reply, that Jabez Corwin was in possession under the deed to him before the death of Isaiah Tuthill. In the present aspect of the case, the judgment of the supreme court must be reversed, and judgment rendered for the defendant on the demurrer.

WELLES, J., delivered a written opinion to the same effect, and all the other members of the court concurred.

Judgment reversed.

PECUNIARY OR VALUABLE CONSIDERATION MUST BE EXPRESSED IN DEED of bargain and sale: *Chiles v. Coleman*, 12 Am. Dec. 396. But a pecuniary consideration, however small, is sufficient: *Bell v. Scammon*, 41 Id. 706.

COVENANT TO STAND SEIZED, WHAT CONSIDERATION WILL SUPPORT: See *Bell v. Scammon*, 41 Am. Dec. 706; *Chancellor v. Windham*, 42 Id. 411, and notes.

DEED TO SON-IN-LAW IN CONSIDERATION OF LOVE AND AFFECTION held good as covenant to stand seized to uses, when: See *Bell v. Scammon*, 41 Am. Dec. 706.

THOMAS v. WINCHESTER.

[*6 NEW YORK (2 SELDEN)*, 397.]

MANUFACTURING DRUGGIST SELLING POISONOUS DRUG LABELED AS HARMLESS, by himself or his agent, is liable in damages to a person who, without carelessness on his part, and relying on the erroneous label, takes such drug as a medicine, on the ground of breach of public duty, and whether the injured person is an immediate customer of the defendant or not.

ACTION BY HUSBAND AND WIFE FOR PERSONAL INJURY TO WIFE is properly brought.

APPEAL from a judgment of the supreme court in favor of defendant in an action on the case for damages. The facts are stated in the opinion.

Charles P. Kirkland, for the appellants.

Nicholas Hill, jun., for the respondent.

By Court, RUGGLES, C. J. This is an action brought to recover damages from the defendant for negligently putting up, labeling, and selling as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, etc.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison county, where the plaintiff's reside.

A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects, such as coldness of the surface and extremities, feeble-

ness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was belladonna, and not dandelion. The jar from which it was taken was labeled "½ lb. dandelion, prepared by A. Gilbert, No. 108 John street, N. Y. Jar 8 oz." It was sold for and believed by Dr. Foord to be the extract of dandelion, as labeled. Dr. Foord purchased the article as the extract of dandelion from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others were labeled alike. Both were labeled like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labeled in Gilbert's name because he had been previously engaged in the same business on his own account at No. 108 John street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell, and taste; but may, on careful examination, be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester and used in his business with his knowledge and assent.

The defendant's counsel moved for a nonsuit on the following grounds:

1. That the action could not be sustained, as the defendant was the remote vendor of the article in question; and there was no connection, transaction, or privity between him and the plaintiffs, or either of them.
2. That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord.
3. That the plaintiffs were liable to and chargeable with the

negligence of Aspinwall and Foord, and therefore could not maintain this action.

4. That according to the testimony Foord was chargeable with negligence, and that the plaintiffs therefore could not sustain this suit against the defendant: if they could sustain a suit at all, it would be against Foord only.

5. That this suit being brought for the benefit of the wife, and alleging her as the meritorious cause of action, can not be sustained.

6. That there was not sufficient evidence of negligence in the defendant to go to the jury.

The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge, among other things, charged the jury, that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending as and for dandelion the extract taken by Mrs. Thomas, or that the plaintiff, Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant, Winchester, was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant and sold by him to Aspinwall, and by Aspinwall to Foord. That if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment, or expense to the husband, and that the recovery should be confined to the actual damages suffered by the wife.

The action was properly brought in the name of the husband and wife for the personal injury and suffering of the wife; and the case was left to the jury with the proper directions on that point: 1 Ch. Pl. 62, ed. of 1828.

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether, the defendant being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action can not be

maintained. If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who, in consequence of the gross negligence of A. in building the wagon, is overturned and injured, D. can not recover damages against A., the builder. A.'s obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of *Winterbottom v. Wright*, 10 Mee. & W. 109, was decided. A. contracted with the postmaster-general to provide a coach to convey the mail-bags along a certain line of road, and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C. could not maintain an action against A. for the injury thus sustained. The reason of the decision is best stated by Baron Rolfe: A.'s duty to keep the coach in good condition was a duty to the postmaster-general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.

Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labeled medicine. Every man who by his

culpable negligence causes the death of another, although without intent to kill, is guilty of manslaughter: 2 R. S. 662, sec. 19. A chemist who negligently sells laudanum in a vial labeled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter: *Tessymond's Case*, 1 Lew. C. C. 169. "So highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of one person has contributed to the death of another: *Regina v. Swindall*, 2 Car. & Kir. 232, 233. And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other: *Regina v. Haines*, Id. 368, 371. Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act.

The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any dam-

age which may result from his negligence: *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29; *Illidge v. Goodwin*, 5 Car. & P. 190. The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge: *Dixon v. Bell*, 5 Man. & Sel. 198. The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label.

In *Longmeid v. Holliday*, 6 Eng. Law & Eq. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion; and to have been "prepared" by his agent, Gilbert. The word "prepared" on the label must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant can not, in this case, set up as a defense that Foord sold the con-

tents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion; and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall can not be complained of by the defendant.

GARDINER, J., concurred in affirming the judgment, on the ground that selling the belladonna without a label indicating that it was a poison was declared a misdemeanor by statute: 2 R. S. 694, sec. 23; but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

GRIDLEY, J., was not present when the cause was decided. All the other members of the court concurred in the opinion delivered by Chief Justice RUGGLES.

Judgment affirmed.

LIABILITY OF REMOTE WRONG-DOER FOR DAMAGES CAUSED BY WRONGFUL ACT OR NEGLIGENCE.—The general rule is that the damages for which a party is liable are those and those only which are the natural and necessary consequences of his acts: *Kellogg v. Chicago etc. R. R. Co.*, 28 Wis. 267; *Ryan v. New York Central R. R. Co.*, 35 N. Y. 211, both citing the principal case. If the act causing the injury was unlawful, the wrong-doer is liable, without reference to the probability that the act would cause that particular injury; not so where the act was not unlawful: *Durham v. Musselman*, 18 Am. Dec. 133. The principal case is cited in *Colegrove v. Harlem etc. R. R. Co.*, 6 Duer, 410, and *Burke v. De Castro*, 11 Hun, 357, to the point that there is a marked distinction between an act of negligence imminently dangerous to human life and one that is not so, the guilty party being liable in the former case to the party injured, whether there was any relation of contract between them or not, but not so in the latter case. That the creator or erector of a nuisance, or one who more remotely, either by negligence or design, furnishes means or facilities for the commission of an injury to another which could not otherwise have happened, is liable therefor, is a general doctrine clearly deducible from *Thomas v. Winchester*: *Anderson v. Dickie*, 1 Robt. 244; S. C., 26 How. Pr. 117; *Cross v. Sackett*, 2 Bosw. 648. The applications of this doctrine are various.

Where one sells liquor to a third person, knowing it to be intended for a slave, he is just as liable as if he had sold it directly to the slave: *Harrison v. Berkley*, 47 Am. Dec. 578. An apothecary negligently selling tincture of opium instead of tincture of rhubarb, to be administered to a third person, whose death is caused by the mistake, is liable in damages to the latter's personal representative under a statute giving damages for an injury resulting in death: *Norton v. Sewall*, 106 Mass. 144, following the principal case. So where a manufacturer of oils for illumination, knowing that naphtha is explosive and dangerous, sells it to a retailer of illuminating oils, who, in igno-

rance of its dangerous character, sells it to a customer equally ignorant, who uses it in his lamp, causing an explosion, the manufacturer is liable for injuries resulting therefrom: *Wellington v. Downer Kerosene Oil Co.*, 104 Id. 64, 68. A shipper of a dangerous explosive, such as nitro-glycerine, giving no information of the nature of the article, would undoubtedly be liable for an injury resulting from an explosion while in transit: *Barney v. Burstenbinder*, 7 Lans. 213; S. C., 64 Barb. 213. Where a vendor of hay, knowing that white lead had been spilled on a certain lot of hay, after carefully removing, as he thought, all that had been damaged, sold a part of the lot to be fed to a cow, causing her death, he was held liable therefor, because silence in such a case was tantamount to deceit: *French v. Vining*, 102 Mass. 132, 136. But where certain wholesale chemists and druggists sold to certain retailers a quantity of sulphide of antimony as and for black oxide of manganese, which it much resembled, and the retailer sold it as black oxide of manganese to the plaintiff, who, supposing it to be what it purported to be, used it in combination with chlorate of potassa, causing an explosion, by which he was injured, it was held, distinguishing the principal case, that the wholesalers were not liable, because the article was not in itself necessarily dangerous, and they had no knowledge that it was intended to be used in the combination which rendered it dangerous: *Davidson v. Nichols*, 11 Allen, 514, 519. This distinction seems to us unsound. If a druggist sells one drug or chemical substance for another, he ought to be presumed to have notice that it will be used just as the genuine article might properly have been, and if it is dangerous when so used, either by itself or by being combined with a substance with which the genuine article might safely be combined, he ought to be held responsible for the consequences of such use. Where a physician employed a person to whitewash a house in which a small-pox patient had died, assuring him that the house had been disinfected, and that he would be safe, and the person so employed caught the disease, it was held, citing the principal case, that the physician would be liable if he had not acted towards the person injured with due care, and if the latter had not been guilty of rashness: *Span v. Ely*, 8 Hun, 258. As the relation in that case between the party committing the injury and the party injured was direct, it is not easy to see the applicability of the principal case.

Where a steam-engine was manufactured expressly for a mill owner, and being defective burst and injured the mill, it was held, in an action by an assignee of the note given for the price, that a counter-claim for damages was allowable, citing and commenting on the principal case: *Page v. Ford*, 12 Ind. 48. Here also there was direct privity between the vendor and vendee of the engine. But where a balance-wheel manufactured by the defendants and sold for use in a certain wood-sawing machine burst after four years' use through a defect in its manufacture, and killed a person who was using it with the owner's consent, the manufacturers were held not to be liable because the wheel was not in itself a dangerous instrument, and the injury was not a natural consequence of its use: *Loop v. Litchfield*, 42 N. Y. 357, commenting on and distinguishing the principal case. The same rule was applied in *Losee v. Clute*, 51 Id. 497, in case of a sale of a defective steam-boiler, approving the distinction laid down in *Loop v. Litchfield*. Where contractors entered into a contract to put a cornice on a mill, the mill owners to furnish the necessary scaffolding, and the scaffolding furnished being defective, fell and killed an employee of the contractors, the mill owners were held liable, because the injury was the natural consequence of their negligence in constructing the scaffolding, citing the principal case: *Cough-*

try v. Globe Woolen Co., 58 Id. 128, reversing S. C., 1 Thomp. & C. 452, 455, where the principal case is also cited. Similarly the owners of a dock who let it with certain scaffolding for the repair of a vessel were held liable for an injury to an employee of the lessees through the falling of the scaffolding, owing to defects therein: *Cook v. New York Floating Dry Dock Co.*, 1 Hilt. 437. On the other hand, where the owner of a derrick let it for hire and an employee of the hirer was injured while using it by the breaking of a defective rope, the owner was held not to be liable: *Burke v. De Castro*, 11 Hun, 354, 357. So where the owners of an elevator let it to a contractor and an employee of the contractor was injured by the falling of the elevator through a defect in its construction, the owners were held not liable: *Barrett v. Singer Mfg. Co.*, 1 Sweeny, 548. In both the cases last cited, *Thomas v. Winchester* was distinguished on the ground that there the injury arose from an act imminently and necessarily dangerous to life, which was not so in the cases at bar.

In *Smith v. New York etc. R. R. Co.*, 19 N. Y. 130, an engineer of a railroad company, which was permitted to run its cars on the track of another company, was injured through the negligence of a switch-tender of the latter company in the management of a switch, and the latter company was held liable, because the act causing the injury being imminently dangerous to life, no privity was required. So where the defendant's servant negligently drove his sleigh against a carriage, and caused the team attached to such carriage to take fright and run over the plaintiff's sleigh and injure the plaintiff, the defendant was held liable, on the ground that the negligent act was a breach of duty towards persons in the highway, and that injury to the persons or property of others was reasonably likely to ensue: *McDonald v. Snelling*, 14 Allen, 290, 295. In both the cases last cited, *Thomas v. Winchester* was referred to as illustrating the correct rule. The licensee of a ferry having let it to another, by whose negligence a passenger was drowned, was held not liable therefor, because there was no privity, and because, though the letting of the ferry might have been unlawful, the injury was not a necessary or natural consequence, referring to *Thomas v. Winchester* as decided on that principle: *Norton v. Winsall*, 26 Barb. 627; *Blackwell v. Winsall*, 24 Id. 361; S. C., 11 How. Pr. 264.

Where a railroad company, by the negligence of its servants, set fire to one of its own buildings by sparks from a locomotive, and the fire spread to the plaintiff's house and destroyed it, the company was held not to be liable, because the damage was too remote, distinguishing the principal case: *Ryan v. New York Central R. R. Co.*, 35 N. Y. 211. But the contrary was held in a precisely similar case in *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. L. 299, 310, disapproving *Ryan v. New York Central R. R. Co.*, *supra*, and citing *Thomas v. Winchester* as illustrating the rule as to the liability of the remote author of an injury, notwithstanding some intervening injury. See generally, as to the liability of a railroad company for fires caused by sparks from its locomotives, the note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 70.

Directors of a corporation issuing spurious stock, or the corporation itself where it has authorized the act, will be liable to an ultimate purchaser of the stock for the injury caused thereby, though there is no privity of contract: *Bruff v. Mali*, 36 N. Y. 206; S. C., 34 How. Pr. 345; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 60, citing the principal case; contra: *Seizer v. Mali*, 32 Barb. 78; S. C., 11 Abb. Pr. 131; *Cazeaux v. Mali*, 25 Barb. 592, *per Peabody*, J., dissenting, distinguishing the principal case. The injured party in

such a case "is not seeking redress upon the contract, but purely for the tortious act, in the commission of which the contract is an accidental incident;" *New York etc. R. R. Co. v. Schuyler, supra*. So those forming a corporation making public false and fraudulent representations as to the capital stock, resources, etc., of the corporation, for the purpose of marketing its shares, are liable to one purchasing shares in the market which turn out valueless: *Cross v. Sackett*, 2 Bosw. 648, also citing *Thomas v. Winchester*. Of course where a remedy is sought on a contract, only parties to the contract, or those in privity with them, can sue: *Murch v. Concord R. R. Corp.*, 29 N. H. 35; *McCluskey v. Cromwell*, 11 N. Y. 597, citing the principal case.

LIABILITY OF MASTER OR PRINCIPAL FOR NEGLIGENCE or misconduct of his servant or agent: See *Blake v. Ferris*, 55 Am. Dec. 304, and note. The principal case is cited on this point in *People v. New York Hospital*, 3 Abb. N. C. 270.

HUSBAND AND WIFE MUST JOIN IN ACTION FOR WIFE'S INJURY, even though the husband has deserted the wife: *Ballard v. Russell*, 54 Am. Dec. 620.

CHAPMAN v. WHITE.

[*6 NEW YORK (2 SELDEN), 412.*]

UNACCEPTED CHECK OR DRAFT ON BANK IS NO ASSIGNMENT OF DEPOSIT therein to the drawer's credit, gives no lien thereon, and creates no liability from the bank to the holder.

APPEAL from a judgment on a controversy submitted without action. The Bank of Geneva gave an ordinary check or draft on the Canal Bank, drawn against a sufficient deposit there. The purchaser sent the instrument by mail to the Canal Bank to pay his note then maturing and payable at that bank. After the Canal Bank received the check or draft, with the direction to apply it to the note when it should be presented, but before the note fell due or was presented the Canal Bank failed, holding at the time an ample deposit of funds of the Bank of Geneva. The holder of the check claimed that the receiver should pay the check in full out of the deposit; and on his refusal to do so the question was submitted. The supreme court held, in an opinion not reported, that the check operated as an equitable assignment of the deposit (to the extent of the sum it called for), and that the receipt by the Canal Bank of the check, with instruction to apply it to the note, constituted it a special deposit in his favor, so that the bank thereafter held the sum as bailee only. The plaintiff thereupon had judgment, from which the defendant appealed.

Pruyn & Reynolds, for the appellant, the receiver.

Quinn, North, and Brown, and Isaac Edwards, of counsel, for the respondent, the check holder.

By Court, GARDINER, J. The question upon the facts stated is, whether the draft under these circumstances operated as an assignment of the deposit of the Geneva Bank, to the amount of the draft, either at law or in equity. The question has been decided by this court, in *Cowperthwaite v. Sheffield*, 3 N. Y. 243; *Harris v. Clark*, Id. 93 [51 Am. Dec. 352]; and in *Winter v. Drury*, 5 Id. 525, decided at the last December term. The instrument in question was an ordinary bill of exchange. It did not purport to be drawn on a particular fund, even if one existed. But there is nothing to show that any part of the deposit of the Geneva Bank was held by the drawees at the time when the draft was received or transmitted, or when the note, for the payment of which the proceeds were to be appropriated, matured, and was presented at the banking-house of the depository.

The Canal Bank paid interest upon and had the right to use the deposit, by arrangement, in their own business. They probably availed themselves of all the advantages secured by the agreement. The depositing bank was therefore a mere creditor at large of the insolvent corporation, and I do not see how their unaccepted bill of exchange placed the plaintiff in any better situation. The cashier was his agent for the purpose of paying the note, and, as it seems to me, for procuring an acceptance of the bill. As this was not done, there can be no pretense that he acquired any right superior to that of his vendor, even if an acceptance would have availed him.

It is said that the instrument is a check. But a check is a bill of exchange, payable on demand: *Harker v. Anderson*, 21 Wend. 373, and cases cited; *Franklin v. Vanderpool*, 1 Hall, 80. The drawee owes no duty to the holder, until the check is presented and accepted. Baron Parke remarked in a case decided in February last that the holder "could not sue the drawee unless he had accepted the check, a practice not usual:" *Bellamy v. Majoribanks*, 8 Eng. L. & Eq. 523. And in *Harker v. Anderson*, *supra*, it was decided that no action could be maintained against the drawer until after presentment and refusal of payment by the drawee and notice to the former. Money deposited generally with a banker becomes the property of the depository. The right of the depositor is a chose in action. It is immaterial whether the implied engagement upon the part of the banker is to pay the sum in gross or in parcels as it shall be required by

the depositor. In either case the draft or check of the latter would not of itself transfer the debt, or a lien upon it, to a third person, without the assent of the depositary: *Dykers v. The Leather Manufacturers' Bank*, 11 Paige, 616. As Judge Cowen remarked in *Harker v. Anderson*, there are *dicta* of learned judges, taking a distinction between checks and bills of exchange, but the whole current of authority is the other way. The supreme court, I think, erred in determining that the plaintiff was entitled to a preference, in the payment of his debt, over the other creditors of the bank, and the judgment should be reversed.

EDMONDS, J., delivered a dissenting opinion.

HOLDER OF UNACCEPTED CHECK OR DRAFT CAN NOT SUE DRAWEE THEREOF: *National Bank v. Second National Bank*, 69 Ind. 481; *Carr v. National Security Bank*, 107 Mass. 49; *Risley v. Phoenix Bank*, 11 Hun, 485; S. C. in court of appeals, 83 N. Y. 325; *Ketchum v. Stevens*, 6 Duer, 483; *Bank of Republic v. Millard*, 10 Wall. 157. So even though the drawee has promised the drawer to pay all his checks: *Carr v. National Security Bank*, 107 Mass. 49. The holder of a check suing the drawee thereon must allege and prove acceptance: *National Bank v. Second National Bank*, 69 Ind. 481. Parol promise to pay is not enough when the statute requires a written acceptance: *Risley v. Phoenix Bank*, 83 N. Y. 325—all citing the principal case.

UNACCEPTED CHECK IS NO EQUITABLE ASSIGNMENT OF DEPOSIT standing to the drawer's credit, nor does it confer any lien: *Harris v. Clark*, 52 Am. Dec. 352; *Rosenthal v. Mastin*, 17 Blatchf. 322; *Butterworth v. Peck*, 5 Bosw. 343; *Ketchum v. Stevens*, 6 Duer, 483; *Parker v. Baxter*, 19 Hun, 415; *Ketchum v. Bank of Commerce*, 19 N. Y. 513, per S. B. Strong, J., dissenting; *Duncan v. Berlin*, 60 N. Y. 153; *Curry v. Powers*, 70 Id. 216, all citing the principal case. But it is otherwise where a draft is drawn on a particular fund: *Schuttleworth v. Bruce*, 7 Robt. 163; *Field v. Mayor etc. of New York*, ante, p. 435, and note.

CHECKS HOW FAR REGARDED AS BILLS OF EXCHANGE: See *Cruger v. Armstrong*, 2 Am. Dec. 126; *Humphries v. Armstrong*, 13 Id. 268; *Smith v. Jones*, 32 Id. 527; *Walker v. Geisse*, 33 Id. 60; *Barbour v. Bayon*, 52 Id. 593, and note. That a check is a bill of exchange is a point to which the principal case is cited in *Risley v. Phoenix Bank*, 11 Hun, 485. An order payable out of a particular fund is not a bill of exchange: *Van Vacter v. Flack*, 40 Am. Dec. 100.

GENERAL DEPOSIT IS PROPERTY OF BANK in which it is deposited, and the relation between the depositor and the bank is that of creditor and debtor, and not that of bailor and bailee, so that the depositor has merely a chose in action with respect to the deposit: *In re Franklin Bank*, 19 Am. Dec. 143, and note discussing this subject; *Lund v. Seamen's Bank*, 37 Barb. 132; S. C., 23 How. Pr. 259; *United States Trust Co. v. Wiley*, 41 Barb, 478; *Butterworth v. Peck*, 5 Bosw. 343; *Lewis v. Park Bank*, 2 Daly, 90; *Ketchum v. Stevens*, 6 Duer, 483; *Willets v. Finlay*, 11 How. Pr. 474; *Egerton v. Fulton National Bank*, 43 Id. 217; *Curtis v. Leavitt*, 15 N. Y. 52, per Comstock, J.; Id. 217, per Paige, J.; *People v. Contracting Board*, 27 N. Y. 384, per Selden, J..

dissenting; *Etna National Bank v. Fourth National Bank*, 46 N. Y. 86; *Lawrence v. Bank of Republic*, 3 Robt. 147; all citing the principal case. So where money is deposited generally with a firm, it is a mere debt, and the depositor has no preference in case of the firm's insolvency: *Butler v. Sprague*, 66 N. Y. 395.

MEAD v. YORK.

[*6 New York (2 Selden)*, 449.]

PAYMENT OF MORTGAGE EXTINGUISHES IT, AS AGAINST THIRD Persons who, even afterwards, acquire liens upon the property, notwithstanding any agreement between the parties, designed to keep it alive to secure future advances.

APPEAL from a judgment canceling a mortgage. The mortgage in question was given by one Smith to Snow, who afterwards assigned it to York, the defendant. The original debt was, in course of time, paid; but by a parol agreement between Smith and York that the mortgage should stand as security, York made further loans, from time to time, to Smith. At length another creditor of Smith obtained judgment against him, the premises described in the old mortgage were sold on execution, and the purchaser now sought to have the mortgage adjudged a nullity as against his title. The judge who first heard the cause held, in an opinion not reported, that as the proof showed an agreement by the parties to the mortgage, made before any right by docketing judgment had intervened, to reinstate the mortgage as a security for further loans, the mortgage ought to be sustained, in equity, on the doctrine of supporting a mortgage for future advances on parol evidence of the intent. The full bench reversed this decision; holding that when the object for which a mortgage is given has once been accomplished, the lien can not, by a parol agreement between the parties and as against third persons, be kept alive for new purposes: and they decreed a cancellation. The defendant appealed.

Abial Cook, for the appellant, the holder of the mortgage.

Nicholas Hill, jun., for the respondent, the purchaser under the judgment.

By Court, SHANKLAND, J. The bond and mortgage which forms the subject-matter of this litigation was executed by Smith and wife, to secure to Snow the payment of a thousand dollars, due and owing to the mortgagee. The object of the parties was to secure the payment of that specific debt. Future advances, or

indorsements, or liabilities, to be made or incurred by the mortgagee, or any other person, for the mortgagor, were not within the contemplation of the parties at that time. The pleadings and proofs all concur in this point. In March, 1837, Snow assigned the bond and mortgage to the defendant, York, with the assent and at the request of Smith, the mortgagor; and it is in relation to the true consideration and agreement in respect to this assignment that the parties differ. The plaintiff contends that the mortgage was assigned to secure York against his liability for indorsing the Wait note, the proceeds of which were paid to Snow, and for no other purpose. The defendant contends that said assignment was made to secure not only his liability on that note, but also any other liability he might assume for Smith, of the like character. I do not deem it important to inquire how the question of fact should be decided in respect to this agreement, subsequent to the execution of the mortgage. Whether the assignment was made to secure the defendant against the payment of the note to Wait only, or to secure him for other and future liabilities by him incurred for Smith in addition thereto, can not, in my opinion, vary the judgment we should pronounce in this cause. The rule seems to be well settled, that a mortgage of real estate, to secure future advances to the mortgagor, or to indemnify against future liabilities to be incurred for him, is valid, not only as against the mortgagor, but also against all other persons, whose rights accrue subsequent in time to the making of the advancement, or the assumption of the liability by the mortgagee, and perhaps in some cases from the date of the mortgage: *Bank of Utica v. Finch*, 3 Barb. Ch. 302; *Shirras v. Caig*, 7 Cranch, 34; *Hendricks v. Robinson*, 2 Johns. Ch. 283; *James v. Morey*, 2 Cow. 246 [14 Am. Dec. 475]; *Craig v. Tappin*, 2 Sandf. Ch. 78, and cases there cited. It seems to be equally well settled that the true object of the parties in respect to the debts or liabilities which the mortgage is intended to secure may be demonstrated by parol evidence, if it is not expressed in the mortgage itself. But I am unable to find it anywhere affirmed as law, that where the original object for which the mortgage was given has been fully accomplished and satisfied, that it can be revived or kept on foot by a parol agreement subsequent to its creation, for other objects than those agreed upon at the time of its execution. It would be contrary to the first principles applicable to the law of mortgages so to hold. The debt is the principal thing, and the mortgage a mere incident. The first is the sub-

stance, the latter its shadow. When the first is destroyed by payment, the latter vanishes. It can not become the incident to another principal, nor the shadow of another substance.

In the case *Ex parte Hooper*, 1 Meriv. 7, it was decided by Lord Eldon, that the holder of a mortgage for four hundred pounds could not, in pursuance of a parol agreement made long afterwards that it should stand as security for a further balance of four hundred pounds on account, tack the last sum to the first, and hold the mortgage as a lien for eight hundred pounds as against other creditors. In *James v. Morey*, 2 Cow. 246 [14 Am. Dec. 475], it was held that the mortgagee can not hold the mortgage as security for any claim which he has against the mortgagor, beyond the sum specifically secured by the mortgage, when objections are interposed by *bona fide* judgment creditors. In the last-mentioned case it did not appear that there was a contemporaneous or subsequent agreement that the mortgage should stand as security for other demands, and in that respect differs from the case in hand. As between the mortgagor and mortgagee, it is possible the courts would allow the parties to keep the mortgage alive, by virtue of a subsequent agreement, as security for other objects than those contemplated at the time of its creation; but not when the rights of third persons come in collision with such arrangement. My impression is, it could not be done in any case. If the agreement of the parties could in any case be allowed to revive a paid mortgage and impart to it vitality, as security for an object not in the contemplation of the parties originally, the circumstances of this case give it strong claim to our regard. For I have no doubt that Mr. York became security for Smith, on the several notes mentioned in his answer, on the implied, if not express, agreement with Smith that the mortgage should stand as his indemnity against loss on those indorsements. Those indorsements were made prior to the rendition of the judgment in favor of the bank, under which the plaintiff claims, although Mr. York paid the money, or most of it, after the date of that judgment. But understanding the rule of law on this subject as above expressed, I must advise a reversal of the decree entered in this cause, and that a decree be entered in accordance with the prayer of the bill, with costs. And this being the opinion of a majority of the court, it is ordered accordingly.

The defendant appealed to this court. The cause was submitted here on printed points.

By Court, GRIDLEY, J. The principle of this case is entirely covered by the doctrine established in *Truscott v. King*, 6 N. Y. 147, decided in this court at the present term. It appears that the original mortgage was long since paid up and extinguished, and though it is probable that the defendant relied on the assignment of the mortgage to him as security for such indorsements as he should make for the mortgagor, I do not find evidence of any explicit agreement between him and the mortgagor, Smith, that after it was satisfied it should be revived and stand as security for such indorsements. And if there was evidence of such an agreement, it would not have the effect to revive the mortgage under the decision in *Truscott v. King*. The judgment must therefore be affirmed.

Judgment affirmed.

PAYMENT OR RELEASE OF MORTGAGE DEBT before or after forfeiture, effect of, on the mortgage lien and the titles of the respective parties: See *Voss v. Handy*, 11 Am. Dec. 101; *Jackson v. Stackhouse*, 13 Id. 514; *Breckenridge v. Ormsby*, 19 Id. 71; *Perkins' Lessee v. Dibble*, 36 Id. 97; *Smith v. Vincent*, 38 Id. 52; *Smith v. Durell*, 41 Id. 732; *Wolfe v. Doe*, 51 Id. 147, and cases referred to in the notes to those decisions. That a sum of money paid by a mortgagor to the mortgagee, if intended and so declared at the time to be applied on the mortgage, and received as a partial or total satisfaction, it has that effect, and no subsequent change of intent by the mortgagor can retroact or renew the security without the consent of the parties interested, and without prejudice to third persons, is held, citing the principal case, in *Champney v. Coope*, 34 Barb. 543. A mortgage once paid can not be revived by parol agreement to the prejudice of other creditors: *Winslow v. Clark*, 2 Lana. 380. A tender after the law-day, of the amount due, discharges the lien of a mortgage: *Kellogg v. Ames*, 41 Barb. 224, both citing *Mead v. York*. The case is explained and distinguished, *per Hoffman, J.*, dissenting, in *Thompson v. Van Vechten*, 6 Bosw. 406, 407, who holds it not to be applicable to the case then before the court.

DE PEYSTER v. MICHAEL.

[6 NEW YORK (2 SELDEN), 467.]

CONDITION IN GRANT IN FEE THAT GRANTEE SHALL NOT ALIEN is void, because it is repugnant to the estate.

CONDITIONS IN RESTRAINT OF ALIENATION IN LEASES for lives or years are lawful.

CONDITIONS IN PARTIAL RESTRAINT OF ALIENATION, as that the grantee shall not alien or assign to a particular person or for a particular time, have been held good, but some of the cases so holding are of doubtful authority.

CONDITION IN DEED THAT GRANTEE ALIENATING SHALL PAY PART OF PRICE received to the grantor is void, because it is a restraint on alienation.

LEASE OF LAND IN FEE RESERVING RENT CREATES FREE-SIMPLE ESTATE, or what was anciently termed a fee-farm estate.

RESTRAINTS ON ALIENATION IN LEASES IN FEE reserving rent are just as invalid as similar conditions in ordinary grants in fee, as where such a lease contains a condition for payment by the lessee of a quarter of the sale money to the lessor, his heirs, etc., in case of alienation with a right of re-entry for non-payment.

RESTRAINTS ON ALIENATION OF LAND HELD IN FEE WERE FEUDAL in their origin and depended on the right of escheat, possibility of reversion existing in the grantor in fee.

STATUTE QUIA EMPTORES ABOLISHED RESTRAINTS ON ALIENATION of fee simple estates in England, because it took away the possibility of reversion from the grantor.

STATUTE QUIA EMPTORES WAS NEVER IN FORCE IN NEW YORK, it seems, and restraints on alienation in grants in fee were therefore valid, until abolished by state statutes.

NEW YORK STATUTES OF 1779 AND 1787 ABOLISHED RESTRAINTS ON ALIENATION in grants or leases in fee whether such leases or grants were executed before or after the statutes were passed, by taking away the grantors' or lessors' possibility of reversion.

RENT RESERVED WITH RIGHT OF ENTRY FOR NON-PAYMENT IS NOT REVERSION or possibility of reversion so as to validate a restraint on alienation, the right of entry being a mere chose in action, and no estate in the land.

EJECTMENT brought in the supreme court. Judgment for the defendant, from which the plaintiff appealed. The opinion states the case.

J. Sutherland, for the appellant.

H. Hogeboom, for the respondent.

By Court, RUGGLES, C. J. This was an action of ejectment brought to recover land on the ground of a breach of the condition to pay quarter sale moneys.

The conveyance out of which the controversy arises is a lease in fee from James Van Rensselaer, of Albany, to William P. Snyder, of Claverack, dated November 23, 1785. The plaintiff, De Peyster, is the assignee of the lessor, and the defendant is the assignee of the lessee. The rent reserved in the lease was forty-eight bushels of wheat. The lessor, for himself, his heirs, and assigns, also saved and reserved the one equal fourth part of all the moneys owing, or that might arise by or from the selling, renting, setting over, assigning, or any how disposing of the premises leased, or any part or parcel thereof, by the said lessee, his heirs, executors, administrators, and assigns, and when, and as often, and every time the same shall be sold, rented, set over, assigned, or otherwise disposed of. The lessee covenanted for himself, his heirs, executors, administrators, and

assigns, that whenever he or they should be inclined to sell the premises, or any part thereof, he or they should make the first offer to the plaintiff in writing. If the lessor should not take it at the price required, after deducting one fourth thereof, and all arrears of rent, the lessor covenanted to grant or permit the lessee, or his representatives, to sell or assign the premises; provided, however, that such sale or assignment should be void, and the premises should revert to the lessor, his heirs, etc., unless the seller or the purchaser should pay to the lessor, his heirs, etc., one fourth part of the purchase money it should be offered for. The lease was declared therein to be given upon the express condition that if the rent should be in arrear for forty days, or if the lessee, his heirs or assigns, etc., should not perform, and keep all the other covenants and conditions on his or their part to be kept and performed, then that the lessor, his heirs, etc., might re-enter upon the premises and repossess and enjoy the same as his former estate.

The plaintiff proved on the trial, or gave evidence tending to show, that a portion of the premises contained in the lease had been sold or assigned to the defendant without paying to the assignee of the lessor a quarter of the sale money, according to the covenant of the lessee.

The defendant insisted that the condition to pay the quarter sales, as they are commonly called, was repugnant to the estate in fee granted by the lease, and was therefore void. The judge at the circuit decided the condition to be void, and nonsuited the plaintiff. The plaintiff excepted to the decision. The supreme court, at the general term, affirmed the decision at the circuit, and rendered judgment for the defendant.

The plaintiff appeals to this court, and the sole question presented on the argument is, whether the condition in the lease to pay the quarter sales is valid or void.

Until the adoption of the constitution of 1846, conditions of this nature in leases for years, for lives, and in fee have not been unusual. These conditions in leases for years and for lives have been repeatedly upheld in this state as valid, although in restraint of alienation. But their validity in grants or leases in fee has been drawn in question in the supreme court only in one case, that of *Jackson v. Schulz*, 18 Johns. 174 [9 Am. Dec. 195]. That was an action of ejectment to recover for condition broken. There were two conditions in the lease: one, that the lessor should have the right of pre-emption in case of a sale by the lessee; and the other, that one tenth of the sale money

should be paid to the lessor. Both conditions had been broken. There was a verdict for the plaintiff. Mr. Justice Platt, who delivered the opinion, held that the condition to pay the tenth of the sale money was valid, and that the plaintiff, for that reason, was entitled to judgment. Chief Justice Spencer was of opinion that the plaintiff was entitled to judgment on the ground that the condition giving the lessor a right of pre-emption was lawful and had been broken. On the other point he expressed no opinion. That the plaintiff in that case was entitled to recover on the breach of the condition in relation to pre-emption was not questioned, and it seems to be entirely clear. The case states distinctly that the lessee assigned the lease without license from the lessors, and without offering the refusal to them. The decision of the other point in relation to the tenth of the sale money was unnecessary, and it may well be that it passed with little or no examination by any member of the court excepting Mr. Justice Platt. It would, therefore, be doing great wrong to other parties interested at that time or since, in the same question, to regard it as settled by the judgment in that case. That judgment never was reviewed in the court for the correction of errors. The defendant had no inducement to go there with it; because it must necessarily have been decided against him in that court on the point noticed by Chief Justice Spencer. If, therefore, on a careful examination of the decision of the supreme court in the case of *Jackson v. Schutz, supra*, on the point now in controversy, it should be found to be erroneous, it ought not to be adhered to as a rule of property; and especially so in regard to the lease in question, which was made long before that decision was pronounced.

In estates for lives or years, conditions in restraint of alienation are lawful. The books are full of cases in which they have been sanctioned in England: Platt on Covenants, 404. In this state, conditions in leases for lives and years to pay to the lessor a portion of the sale moneys have been repeatedly recognized as valid: *Jackson v. Corliss*, 7 Johns. 531; *Jackson v. Silver nail*, 15 Id. 278; *Jackson v. Groat*, 7 Cow. 285; *Jackson v. Kipp*, 3 Wend. 230; *Livingston v. Stickles*, 7 Hill, 253. The foundation of the power of the lessor to restrain alienation in those cases rests exclusively upon his ownership of the reversion. This appears by Brooke's Abr., Condition, 57 a. "If a man have lands for a term of years on condition that he shall not grant over his estate, this is good by reason of a reversion remaining in the lessor. The contrary of a feoffment on such condition, or

that the feoffee shall not commit waste, for no right or interest remains in the feoffor;" and according to the Touchstone, p. 130, Preston's ed., Law Library, vol. 30, "if a gift had been made to an abbot and his successor, on condition not to alien, this had been a good condition on account of the reversionary right of the grantor, since he will be entitled to the land by way of reverter on the dissolution of the corporation. Even on a grant in fee to a corporation, and though the corporation may, unless restrained by condition, alien the fee simple, yet on the dissolution of the corporation, while owner, the reverter would be to the grantor or his heirs, instead of there being an escheat to the lord of the seignory."

These references are sufficient to show that the owner of the reversion, or possibility of reverter only, can restrain the alienation by his grantees in fee; and we have been referred to no case, and can find none, showing that any other interest whatever in the grantees will enable him to impose such restraint. We speak of the law as it stood previous to the constitution of 1846, which forbids the reservation of quarter sales and the like.

But it is a well-established principle that where an estate in fee simple is granted a condition that the grantees shall not alien the land is void. Littleton says: "Also, if a feoffment be made on this condition that the feoffee shall not alien the land to any, this condition is void; because when a man is enfeoffed of lands or tenements, he hath the power to alien them to any person by law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him which should be against reason, and therefore such a condition is void." Sec. 360.

Coke, in his commentary on this section, adds: "And the like law is of a devise in fee upon a condition that the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass:" Co. Lit. 223 a. The language of Mr. Cruise is: "A condition annexed to the creation of an estate in fee simple, that the tenant shall not alien, is void and repugnant to the nature of the estate given; for a power of alienation is an incident inseparably annexed to an estate in fee simple:" Cru. tit. 13, c. 1, sec. 22. The right of alienation passes by the grant of the fee as perfectly as if it were given by the express terms of the grant. Without such right the estate granted would be neither a fee simple nor any other estate known to the law. Lands granted in fee on condition that the

grantee shall not enjoy the lands, or shall not take the profits of the lands; or on condition that the heir of the grantee shall not inherit the lands; or on condition that the grantee shall not do waste; or on condition that his wife shall not be endowed—in all these and the like cases, the condition is void as repugnant to the estate: Shep. Touch. 131. “A condition annexed to an estate given is a divided clause from the grant, and therefore can not frustrate the grant precedent, neither in anything expressed nor in anything implied which is of its nature incident and inseparable from the thing granted:” *Stukeley v. Buller*, Hob. 170.

The reason why such a condition can not be made good by agreement or consent of parties is, that a fee-simple estate and a restraint upon its alienation can not, in their nature, co-exist. The ownership of the fee can not exist in one person while the ownership of the right of alienation of its fruits exists in a different person. This is a principle older than the common law of England. Grotius, b. 1, c. 6, sec. 1, says: “Since the establishment of property, men who are masters of their own goods have by the law of nature the power of disposing of or of transferring all or any part of their effects to other persons; for this is the very nature of property; I mean of full and complete property;” and therefore Aristotle says: “It is the definition of property to have in one’s self the power of alienation.”

That this principle was at an early day ingrafted upon the common law and applied to estates in fee, we have the authority of Littleton, as above cited, and of Coke: 2 Inst. 65. By the common law, it is against the nature and purity of a fee simple “for the tenants to be restrained from alienation.” But the rule of common law on this point is not founded exclusively on principles of natural law. It rests also on grounds of great public utility and convenience, in facilitating the exchange of property, in simplifying its ownership, and in freeing it from embarrassments, which are injurious, not only to its possessor, but to the public at large.

But it is said that the condition that the grantee shall pay one fourth of the sale money whenever he sells the land is not repugnant to the estate, because it is not an absolute and entire restraint and prohibition; and that the grantee may make a valid conveyance of his land upon paying the grantor a part of the price. Let us examine this proposition upon reason and upon authority.

If the continuance of the estate can be made to depend on

the payment of a tenth or a sixth or a fourth part of the value of the land at every sale, it may be made to depend on the payment of nine tenths or the whole of the sale money. It is impossible, on any known principle, to say that a condition to pay a quarter of the sale money is valid, and a condition to pay the half or any greater proportion would be void. If we affirm the validity of a condition to pay a quarter, we must affirm a condition to pay any greater amount. It would be a bold assertion to say that the adoption of such a principle would not operate as a fatal restraint upon alienation. That which can not be done by a direct prohibition can not be done indirectly. The enforcement of the restraint upon alienation by requiring money to be paid for the privilege, and by a forfeiture in case of non-payment, separates the incident of free alienation from the estate in fee as effectually as a direct prohibition. The principle of natural right, the rule of the common law, and the reasons of public policy, which forbid restraints upon the disposition of one's own property, are as effectually overthrown by the one as by the other.

The indefatigable research of the counsel for the plaintiff has not furnished us with a single case or a single authority from the elementary writers in England in favor of the validity of such a condition in the grant of a fee-simple estate, or in the grant of a fee-farm lease.

There are cases where conditions not to sell or assign to a particular person, or for a particular time, have been held good, but some of them are of doubtful authority; and they all differ from the case in controversy in this: that the condition does not appear on its face to impair the value of the lands in the hands of the grantee, and they take away from him no part of the fruits of the sale when made in conformity with the grant.

There is, however, abundant authority to show that conditions that the grantee shall not alien without paying a sum of money therefor are unlawful restraints on alienation, and therefore void. In Mr. Preston's edition of Sheppard's Touchstone, p. 130, it is laid down that "if the condition of a feoffment or grant be that the feoffee or grantee shall not alien the thing granted to any person whatever; or that if he do alien to any person, he shall pay a fine to the feoffor, those and the like conditions are void in the case of a common person as repugnant to the estate;" to which the editor adds, by way of explanation of the text, "since the condition takes away one of the incidents of ownership, namely, the right of alienation which the law encourages."

That the word "fine" was used by the author of the Touchstone and by Lord Coke to denote a sum of money agreed to be paid on alienation, and not a penalty imposed by any court, can admit of no doubt. In the former sense, it is used not only in the older, but in the modern books: Lilly's Conveyancer, 624. Jacob, in his law dictionary, says the premiums given on renewal of leases are termed fines, and there are fines for alienation of copyholds paid to the lord: Vol. 3, p. 72, ed. of 1811. One of the definitions of the same word given by Mr. Burrill is, "A sum of money or price paid for obtaining a benefit, favor, or privilege, as the ancient fines for obtaining a writ and for alienation."

That a condition requiring a devisee to pay a sum of money upon aliening the estate is void, was expressly decided in the case of *King v. Burchell*, by Lord Keeper Henley, Amb. 379. The case was shortly this: John Blunt devised lands in fee tail to his cousin, John Harris, remainder to William King and his heirs forever; with a proviso "that the bequests and limitations of all the premises limited to his cousin, John Harris, and his issue, male and female, is, upon this special consideration, that if John Harris, or his issue or any of them, shall alienate, mortgage, or incumber, or commit any act or deed whereby to alter, change, charge, or defeat the bequests, he or they should pay or cause to be paid, and he did thereby charge the premises with two thousand pounds unto such person or persons, his or their heirs, who should or ought to take next by virtue or means of any of the bequests or limitations."

In favor of the validity of the condition, it was argued that it was not the case of a restraint, but of an alternative; that is, if you bar the entail you shall pay.

On the other side, it was insisted that the proviso was against law; that it was to restrain what was incident to an estate tail, and therefore void.

Henley, lord keeper (afterwards Lord Chancellor Northington), took time to consider, and on the twentieth of November, 1759, delivered his opinion that John Harris took an estate tail, and that the proviso was repugnant to the estate. This must be regarded as a direct adjudication on the point now immediately under consideration; because if the condition to pay a sum of money upon the alienation of an entailed estate be repugnant to the estate, for the reason that it prevents or restrains alienation, it must be so *a fortiori* in any other estate of inheritance.

In addition, the language of Nelson, C. J., in *Livingston v.*

Stickles, 7 Hill, 257, may be referred to; where he says the direct tendency of the covenant to pay tenth sales was to restrain alienation; and that these tenth sales are, in the nature of the ancient fines upon alienation, incident to military tenures, and for aught he could see, clog the transmission of property from hand to hand as heavily as those ancient feudal burdens long ago abolished.

Upon the highest legal authority, therefore, it may be affirmed that in a fee-simple grant of land, a condition that the grantee shall not alien, or that he shall pay a sum of money to the grantor upon alienation, is void, on the ground that it is repugnant to the estate granted.

The lease on which this action is brought created an estate of inheritance in the grantee, his heirs and assigns. It is a fee-simple estate, subject only to the payment of the rents reserved, and to the performance of the lawful conditions contained therein. It is what was anciently called a fee-farm estate. A fee-farm rent is a rent charge issuing out of an estate in fee. A grant of lands in fee reserving rent is only letting lands to farm in fee simple instead of the usual methods for life or years: 2 Bla. Com. 43; Hargrave's Notes, 143 b, note 5. A fee-farm rent is a perpetual rent reserved on a conveyance in fee simple: 3 Cru. 284. Fee farms are lands held in fee to render for them annually the true value, or more or less, and is called a fee farm because a farm rent is reserved upon a grant in fee: 2 Inst. 44. It is expressly said in the statute of *quia emptores* that it extends only to lands holden in fee simple: 1 Evans' Stat. 195. Sir Edward Coke declares that it extends to lands held in fee farm: 2 Inst. 502. These references are made for the purpose of showing that the estates created by leases like the present are estates of inheritance; that they are classed among estates in fee simple; that no reversionary interest remains in the lessor; and they are, therefore, subject to the operation of the legal principles which forbid restraints upon alienation, in all cases where no feudal relation exists between the grantor and grantee.

Restraints upon alienation of lands held in fee simple were of feudal origin. A feoffment in fee did not originally pass an estate in the sense in which we now understand it. The purchaser took only an usufructuary interest, without the power of alienation in prejudice of the heir or of the lord. In default of heirs, the tenure became extinct and the land reverted to the lord. The heir took by purchase and independent of the ancestor, who could not alien, nor could the lord alien the seignory

without the consent of the tenant. This restraint on alienation was a violent and unnatural state of things, contrary to the nature and value of property, and the inherent and universal love of independence. It arose partly from favor to the heir, and partly from favor to the lord, and the genius of the feudal system was originally so strong in favor of restraint upon alienation, that by a general ordinance mentioned in the book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off: 3 Kent's Com. 506. The same learned commentator proceeds to give an outline of the various causes which gradually led to the mitigation of these severe restrictions until they were finally removed (except as to the king's tenants *in capite*), by the statute of *quia emptores terrarum*.

It will be necessary to refer briefly to the English feudal tenures for the purpose of ascertaining the mode and process by which restraints upon alienation in fee were abolished in that country; and then to show that similar changes have taken place at a latter period in the law of this state.

All the land in the kingdom is supposed, says Blackstone, to be holden mediately or immediately of the king, who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king, and thus partaking of a middle nature were called mesne, or middle lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or in other words, B. held his lands immediately of A., but mediately of the king. The king, therefore, was styled lord paramount; A. was both tenant and lord, or was a mesne lord, and B. was called tenant para-vail, or the lowest tenant, being he who was supposed to make avail or profit of the land: 2 Bla. Com. 59.

Out of these feudal tenures or holdings sprung certain rights and incidents, among which were fealty and escheat. Both these were incidents of socage tenure, of which alone it is necessary to speak. Fealty was the obligation of fidelity which the tenant owed to his lord. Escheat was the reversion of the estate on a grant in fee simple upon a failure of the heirs of the owner. Fealty was annexed to and attendant on the reversion. They were inseparable. These incidents of feudal tenure belonged to the lord of whom the lands were immediately holden; that is to say, to him of whom the owner for the time being purchased.

These grants were called subinfeudations, because they created new feudal relations between the grantor and grantee. Each grantor, as the feudal lord of his grantee, was entitled to require his grantee to take the oath of fealty to him, and in case of the death of his grantee, while the owner of the land, without heirs, the grantor was entitled to the reversion or escheat.

Title by escheat in the English law, says Kent, 4 Com. 423, was one of the fruits and consequences of feudal tenure. When the blood of the last person seised became extinct, and the title of the tenant in fee failed from want of heirs, the land resulted back, or reverted to the grantor or lord of the fee from whom it proceeded, or to his descendants or successors. The escheat was originally called the reversion: *Burgess v. Wheat*, 1 W. Black. 133. It was so called in the time of Bracton: Cru., tit. 30, sec. 8. It was the sole foundation on which rested the right of a grantor in fee to restrain the alienation by his grantee. The grantee, during the whole period, from the conquest down to the 18 Edward I., when the statute of *quia emptores* was passed, could not alien his land without the license or consent of the lord, who was the owner of this reversionary interest.

For reasons unnecessary here to be stated, but which may be found in 2 Bla. Com. 91, and which are recited in the preamble of the statute of *quia emptores*, that statute was enacted. It was thereby provided, "that from henceforth it shall be lawful for any freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as the feoffor held before."

The effect of this statute is obvious. By declaring that every freeman might sell his lands at his own pleasure, it removed the feudal restraint which prevented the tenant from selling his land without the license of his grantor, who was his feudal lord. This was a restraint imposed by the feudal law, and was not created by express contract in the deed of conveyance. It was abolished by this clause in the statute. By changing the tenure from the immediate to the superior lord, it took away the reversion from the immediate lord; in other words, from the grantor, and thus deprived him of the power of imposing the same restraint by contract or condition expressed in the deed of conveyance. The grantor's right to restrain alienation immediately ceased, when the statute put an end to the feudal relation

between him and his grantee; and no instance of the exercise of that right in England, since the statute was passed, has been shown or can be found, except in the case of the king, whose tenure was not affected by the statute, and to whom, therefore, it did not apply.

The reason given by Lord Coke why a condition that the grantee shall not alien is void is as follows: "For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee of all his power to alien. And so it is if a man be possessed of a term for years, or of a horse, or any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alienate the same, the condition is void, because his whole interest and property is out of him, so as that he hath no possibility of reverter; and it is against trade and traffic and bargaining between man and man." "A man, before the statute of *quia emptores*, might have made feoffment in fee, and added further, that if he or his heirs did alien without the license, that he should pay a fine, then this had been good; and so it is said that then the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter. And so it is in the king's case, at this day, because he may reserve a tenure to himself": Co. Lit. 223 a, b. The same distinction between restraints of alienation by a common person and by the king is stated in the Touchstone, p. 130. After stating, as heretofore quoted, that conditions to pay a fine upon alienation are void in the case of a common person, it is added: "But, in the case of the king, such conditions are good, since, in construction of law, the king is the donor, and has a possibility of reverter."

The following propositions are clearly deducible from these authorities:

1. That conditions in restraint of alienation are of feudal origin, and depended on feudal tenure. They were good wherever the grantor had the escheat or reversion.
2. That they were good before the statute of *quia emptores*, because the grantor at that time was the feudal lord, and had the reversion.
3. That since the statute they are bad, because the escheat or reversion was thereby taken away from the grantor.
4. That they are good in case of the king, since the statute as before, because the statute does not take the escheat from the crown.

5. That the possibility of reverter, spoken of by Lord Coke, is the right to the escheat, and nothing more nor less.

The absence of all authority, in England, in support of conditions like that now in question, from the time of the passing of the statute of *quia emptores* to this day, in all estates of inheritance, whether rent be reserved or not, is a strong confirmation of the truth of these propositions; and it fully warrants the conclusion that nothing but a reversion remaining in the grantor will make such a condition valid.

One more observation, however, remains to be made in relation to the law in England before we proceed to examine whether the law in this state differs from it, or is in conformity with it. It is this: that the statute of *quia emptores* in England applied to and operated upon leases in fee, or fee-farm lands. For this we have the authority of Lord Coke in these words: "And this act [the statute of *quia emptores*] extendeth to lands holden by fee farm:" 2 Inst. 501. No doubt, therefore, can be entertained that the seignory and escheat of lands so holden were transferred by that statute from the grantor to the chief lord of the fee; and that by its operation such lands were freed from restraint upon alienation in the same way, and to the same extent, as lands conveyed in fee without reserving rents.

We now come to the inquiry, whether the law in this colony, before the revolution, differed from the law of England; and if it did, whether the statutes of this state, passed shortly after its new political organization, produced any and what change in it, with reference to the question in controversy.

The original patent or grant to Killian Van Rensselaer, under which the lands in question are said to be held, was not given in evidence, and is not made a part of this case. It is probably not material to either party that it should have been introduced. It is said that the statute of *quia emptores* was not in force within the colony of New York before the revolution. In *Jackson v. Schutz*, 18 Johns. 179 [9 Am. Dec. 195], the late Mr. Emott, in his argument in favor of the validity of the tenth sales, insisted that the statute of *quia emptores* was never in force in this state, and Chief Justice Spencer said it was never supposed that it existed here. The colonial government acted upon the supposition that it did not extend to the colony. It is well known that a number of colonial grants were made (and the patent to Killian Van Rensselaer is said to be among the number), by which manors were created within the province; and the patentees were authorized to grant lands within those

manors, to be holden of them and their heirs as immediate lords, to whom, by the feudal tenures thus created, fealty was due, and who were entitled to the reversions or escheats, in the same manner as the mesne lords in England were before the statute of *quia emptores*. These manorial tenures could not have been created if that statute had extended to the province: 2 Bla. Com. 92. Our statute of tenures of the twentieth of February, 1787, 1 Rev. Laws, 70, seems to recognize the existence of these manorial tenures within this state. The fifth section saves to the mesne lords the fealty and feudal services due to them on conveyances made before the fourth of July, 1776. We shall therefore assume, without further examination, that the statute of *quia emptores* was not in force within the colony; not only because this assumption is in conformity with the action and understanding of the colonial government, but because it is most favorable to the validity of the restraints on alienation claimed by the plaintiffs.

Indeed, it follows from this assumption as a necessary consequence that the restraints on alienation in grants in fee made in the colony before the revolution were valid, as they were in England before the reign of Edward I. The immediate lord, or grantor, was entitled to the feudal services incident to tenure in socage, and to the reversion or escheat on which the right to restrain alienation depended. But this was entirely changed by the statute of this state, passed the twenty-second of October, 1779, in connection with the statute of tenures passed in 1787. Both these statutes took effect retrospectively, and operated upon all lands and tenures held under colonial grants, the one from the ninth and the other from the fourth of July, 1776. They operated, therefore, upon the lease in question, as if they had been passed at the time to which they related. The fourteenth section of the statute of 1779 is as follows: "The absolute property of all messuages, lands, tenements, and hereditaments, and of all rents, royalties, franchises, prerogatives, privileges, escheats, forfeitures, debts, dues, duties, and services by whatsoever names respectively the same are called and known in the law, and all right and title to the same, which next and immediately before the ninth day of July, in the year 1776, did vest in or belong, or was or were due to the crown of Great Britain, be, and the same and each of them hereby are declared to be, and ever since the said ninth day of July, in the year of our Lord 1776, to have been and forever hereafter shall be, vested in the people of this state, in whom the sovereignty

and seignory thereof are and were united and vested, on and from the said ninth day of July, in the year of our Lord 1776:" 1 Jones & Varick, 44.

The first section of the statute of tenures, 1 Rev. Laws, 70, is substantially a transcript of the statute of *quia emptores*. The second section abolished military tenures and all their incidents from the thirtieth of August, 1664, when the province was surrendered by the Dutch to the English. It also abolished all tenure *in socage in capite*, with all its fruits and consequences. The third section converted all manorial and other tenures into free and common socage. The fourth section requires all conveyances and devises of any manors, lands, etc., theretofore made, to be expounded as if the said manors, lands, etc., had been held from the beginning in fee and common socage only. The fifth section declares that the act shall not be construed to take away the rents and services due to tenure in free and common socage from the person previously entitled to them, or the fealty or distresses incident to that tenure. The third and fourth sections of this statute render it entirely immaterial to know what was the tenure under which the land in question was originally held by the patentees. Whatever else it may have been, it was converted by the statute into free and common socage. It was held of the crown until the revolution, and the crown was, until then, entitled to the escheat of all the lands remaining in the hands of the patentee and his heirs at that time.

The statute of 1779 transferred the seignory and escheat to the people of this state, who then became the chief lords of the fee. As to lands granted in fee by the proprietors of the patent before the revolution, the escheat became afterwards vested in the people of the state by the operation of the statute of tenures as soon as they changed hands by conveyance in fee, if not immediately upon the passing of the act.

These statutes performed the same functions and wrought the same changes in the feudal tenures of this state as the statute of *quia emptores* did in England. They put an end to all feudal tenure between one citizen and another, and substituted in its place a tenure between each landholder and the people in their sovereign capacity. They converted all rents upon leases in fee from rent-service into rent-charges or rentseck; and by taking away the grantor's reversion or escheat, they removed the entire foundation on which the power of a grantor to restrain alienation by his grantee formerly rested; and they placed the law of this

state, in respect to the question in controversy, on the same footing on which the law of England now stands, and has stood since the reign of Edward I.

The effect of these statutes upon the question in controversy, being indirect and consequential, may not have been observed or understood at the time by the landholders, or the scriveners who drew their leases. The legality of these restraints on alienation in leases in fee before the revolution, and their legality in leases for lives and years before and after that period, may have led, and most probably did lead, to their continuance in leases in fee after that change in the government and the enactment of the statutes referred to. But after a careful examination of the grounds on which these restraints on alienations in fee were originally sustained in England; of the change in the law there by statute nearly six hundred years ago; of the mode in which that change was wrought; and finding that the same change has taken place here by our own statutes, we can not entertain a doubt that the condition to pay sale money on leases in fee is repugnant to the estate granted, and therefore void in law.

It was contended on the argument that the reservation of rent upon the conveyance in question distinguished this case, in reference to the validity of the condition in restraint of alienation, from the case of a conveyance in fee without rent; and that the lessor, by reserving rent, retained an interest in the land, which made the condition to pay sale money valid. We think a sufficient answer has been already given to this proposition, upon the authority of Lord Coke, that the statute which changed the law of England, and made these conditions unlawful, applied as well to conveyances in fee where rent is reserved as to conveyances where it is not. But a further answer is, that a rent is not a reversion, or a possibility of reversion, and that nothing but such a reversionary interest in the land has ever been held to authorize a condition against alienation. Admitting that the rent and the land are parts of the same estate, they are not only capable of ownership by different persons, but in their nature they must belong to different persons. The grantor owns the rent and the grantees own the land. Each has an estate of inheritance in his own part. The right of alienation is inseparably incident to the estate of each. It is annexed to the inheritable quality of that estate. The power of the lessor to alien his rent can not be restrained. "If a man be seised," says Coke, "of a seignory, a rent, or an advowson, or any other inheritance that lyeth in grant, and by deed granteth

the same to a man and his heirs, upon condition that he shall not alien, this condition is void:" Co. Lit. 223 a. By the old feudal law, the tenant could not alien his fee without the lord's license; and the lord could not alien his seignory without the tenant's attornment. While the tenures were military, the lord had an interest in having a brave and loyal tenant, true to his oath of fidelity, and capable of rendering military service for his lands; and the tenant, on the other hand, was interested in living under the protection of the military chief of his own choice and adoption. The feudal restraint was mutual; but when the feudal relation between the parties was broken up, these feudal restraints were thereby dissolved; and the common-law principle, applicable to property not feudal, immediately took effect and rendered similar restraints created by contract entirely void.

The right of re-entry for non-payment of rent, or the non-performance of other covenants, is not such an interest in the estate as makes the condition in question valid. It is not a reversion, nor is it the possibility of reversion, nor is it any estate in the land. It is a mere right or chose in action, and if enforced, the grantor would be in by the forfeiture of a condition, and not by a reverter. At common law, a right of entry, being a mere right of action, could not be granted over: Co. Lit. 214; 2 Cru., tit. 18, c. 1, sec. 15. It is only by statute that the assignee of the lessor can re-enter for condition broken. But the statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other estate. It is a totally different interest from the possibility of reverter spoken of by Coke and in the Touchstone. It is no more than the possibility of a forfeiture. When property is held on condition, all the attributes and incidents of absolute property belong to it until the condition be broken; and this is especially true, when, as in this case, the person entitled to the benefit of the condition is not in any degree affected in his right, under the condition, by the exercise and enjoyment of those attributes and incidents. The lessor's right of entry for breach of the lawful conditions is not defeated or impaired by the sale of the lessee's interest in the land.

It was also said on the argument that the quarter-sale money, being reserved in the lease, was not the money of the lessee, but the money of the purchaser who buys from the lessee. If there be any force in this objection, it must rest on the ground that the reservation takes nothing from the pocket of the tenant,

and is therefore no injury to him. But this is clearly a mistake. We have already seen that the grant in fee carries with it the inseparable right of alienation, and the reservation is an attempt to separate from the thing granted an incident or quality which can not be detached from it. Rent is separable from the ownership in fee of the land; but the right of alienation is not. The reservation of rent does not affect the alienation of the tenant's interest in the land. The reservation of the sale money restrains, and may destroy it. Besides, the reservation is an attempt to take from the tenant not only a part of the price of the land, but a part of the price of all the buildings and other improvements he may have put on it, which may be even more valuable than the land itself. These never belonged to the lessor. The obvious effect of a reservation of quarter sales, if valid, is to discourage and prevent the tenant from making these improvements, because in case a change in his circumstances should make it necessary to sell his farm, one quarter of the value of the improvements would go to his lessor. Moreover, if the reasoning of the plaintiff's counsel sustains his proposition, it proves too much; it will sustain the proposition that a like reservation is good in a grant in fee without rent; and for this no one will contend. The reservation of sale money must stand on the same footing and be liable to the same objection as the condition to pay it to the grantor. If the one restrains alienation, the other does the same thing. If one is repugnant to the estate granted, the other is equally so.

The condition in restraint of alienation can not be sustained on the ground that it may be useful to protect the lessor's interest in the rent. The covenant of the lessee to pay, which runs with the land, and the lessor's right to re-enter for non-payment, are practically a sufficient security for the rent. But if they were not, it could make no difference. The lessor, when he parted with the fee of the land, parted with his right to control the lessee's disposal of it. The rent, and the right to re-enter for non-payment, are not reversionary, whatever they may be called in the lease; and it is not enough to say that they resemble or are analogous to such interests. The condition against waste can only be imposed by the reversioner. It is repugnant to the estate granted, except where a reversion remains with the grantor. Neither the reservation of rent nor the right of re-entry for non-payment will uphold a condition against waste in a lease in fee. The condition against waste would be a much more efficient protection of the landlord's in-

terest in the rent than the condition to pay quarter sales; and it would be an absurdity to uphold the latter on this ground, where the former can not be sustained.

The arguments above referred to in favor of the condition to pay sale money are founded on the proposition that the reservation of rent and the right of re-entry are interests in the land remaining in the lessor, analogous to a reversion, and equivalent thereto, for the purpose of sustaining the validity of the condition. But there is no legal equivalent for a reversion for that purpose. The argument is an attempt to introduce a new reason never heretofore regarded as sufficient for supporting the condition. The reasoning from analogy is still more frail and feeble. It is only on grounds strictly technical that the escheat, or any other remote reversion, is made to sustain the condition, and nothing but a reversion, or the possibility of reversion, is included within that technical rule. A further examination of the force and weight of the reasons in favor of the condition, derived from supposed analogies and equivalents, would open a wide field of argument upon the general tendency of these restraints upon the transfer of property, on which we think it unnecessary to enter, and therefore forbear to do so.

Our intention has been to investigate and decide this question on strict legal authority, without adverting to any general considerations of public policy. We have examined it with great care, and feel assured of the soundness of the conclusions to which the examination has brought us. The case was most ably and learnedly argued; and this seemed to render it proper to state the grounds of our decision at greater length than would otherwise have been thought necessary.

The judgment of the supreme court ought to be affirmed.

The other members of the court (GRIDLEY, J., absent) concurred in the foregoing opinion.

Judgment affirmed.

RESTRAINTS ON ALIENATION.—This subject is discussed to some extent in the note to *Jackson v. Schutz*, 9 Am. Dec. 200, but a further examination of the question of the validity and effect of such restraints, particularly as to points not touched upon in the former note, will be here presented. An extended discussion is perhaps rendered unnecessary by that note, and more especially by the learned and elaborate opinion of Mr. Chief Justice Ruggles in the principal case, constituting as it does an almost complete commentary upon this topic. The case is recognized as the leading American authority on the subject. It is referred to in *McCleary v. Ellis*, 54 Iowa, 311; S. C., 37 Am. Rep. 205; S. C., 22 Alb. L. J. 347; S. C., 6 N. W. Rep. 571, as "containing a most exhaustive consideration of this ques-

tion." And Mr. Justice Christiany, in *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61, says of it: "This is the fullest and ablest discussion of the whole question of restrictions upon the sale of estates in fee (except as to the question of time), and contains the most complete citation of authorities of any case I have found in the books, and relieves me from going over the general subject."

GENERAL CONDITION RESTRAINING ALIENATION OF FEE-SIMPLE ESTATE, either in a devise or grant, is unquestionably void, because it is repugnant to the estate, the power of alienation being an inseparable incident of such estates: Leake's Dig. of Law of Real Prop., pt. 2, c. 1, sec. 6, § 3; 1 Wash. Real Prop. 52, 54; Boone Real Prop., sec. 17; Williams Real Prop. 86, 87, note; 2 Jarm. Wills, 15; 2 Redf. Wills, 288; 17 Cent. L. J. 189; *Bradley v. Peixoto*, 3 Vea. 324; *Rochford v. Hackman*, 9 Hare, 475; *Jones' Will*, 23 L. T., N. S., 211; *Hadley v. Northampton*, 8 Mass. 37; *Blackstone Bank v. Davis*, 21 Pick. 42; *Gleason v. Fayerweather*, 4 Gray, 348; *Lane v. Lane*, 8 Allen, 350; *Norris v. Hensley*, 27 Cal. 439; *McCleary v. Ellis*, 54 Iowa, 311; S. C., 37 Am. Rep. 205; S. C., 22 Alb. L. J. 347; S. C., 6 N. W. Rep. 571; *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61, 75; *Schermerhorn v. Negus*, 1 Denio, 448; *Oxley v. Lane*, 35 N. Y. 346; *Anderson v. Cary*, 36 Ohio St. 506; S. C., 38 Am. Rep. 602; *Rufseyder v. Hunter*, 19 Pa. St. 41; *Walker v. Vincent*, Id. 369; *Yard's Appeal*, 64 Id. 95; *Doebler's Appeal*, Id. 9; *Taylor v. Mason*, 9 Wheat. 350. Thus where land was devised to the testator's son, providing as follows: "But he shall in no wise sell or alienate any of the property, as it is intended that he shall have a life interest only in the same, with remainder over to his heirs in fee," it was held that the son took a fee simple, under the rule in *Shelley's Case*, and that the condition was nugatory: *Doebler's Appeal*, 64 Pa. St. 9. To the same effect are *Norris v. Hensley*, 27 Cal. 439; *Gleason v. Fayerweather*, 4 Gray, 348; *McCleary v. Ellis*, 54 Iowa, 311; S. C., 37 Am. Rep. 205; *Rufseyder v. Hunter*, 19 Pa. St. 41; *Walker v. Vincent*, Id. 369. In *Rufseyder v. Hunter*, *supra*, such a condition in a devise was described by Gibson, J., as "an impotent attempt to give title to property without the incidents of ownership." And in *Walker v. Vincent*, *supra*, Lowrie, J., said: "The law does not allow an estate to be granted to a man and his heirs with a restraint on alienation, and frustrates the most clear intention to impose such a restraint." So a condition in a devise in fee that the devisee shall make oath "that he will not make any change during his life" in the testator's will respecting his property is repugnant to the estate, and void: *Taylor v. Mason*, 9 Wheat. 350. So where devisees were required to contract in writing that they would not alienate, etc., before the proceeds of certain realty should be paid to them: *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61. And a provision in a will that land devised to a number of persons shall not be divided is in substance a prohibition on alienation, and therefore void: *Smith v. Clark*, 10 Md. 186; *Lovett v. Gillender*, 35 N. Y. 617. The power of alienation is one of the most valuable rights of ownership, and any attempt to cut off this right from the highest estate known to the law must obviously be unavailing. To say that one shall have an estate in fee simple in land, and yet that he shall not alienate it, is to say that he shall have such an estate, and at the same time that he shall not have it, for an inalienable estate in fee is an absurd impossibility. It is true that the ancient fees of the feudal system were inalienable, because the owner was in fact as well as in name a mere tenant to a superior owner, who had, as stated in the principal case, a possibility of reversion in the land, and because it was contrary to the fundamental prin-

ciples of that system for a tenant owing fealty to his lord to substitute another person in his place without the lord's consent. But even before the statute *quia emptores*, a right of alienation began gradually to be ingrafted upon estates in fee: 1 Wash. Real Prop. 52, 53; and ever since that statute, and similar statutes in this country, there has been a steadily increasing tendency in the courts to favor the free alienation of property, and to disown every contrivance intended to restrain it: *Norris v. Hensley*, 27 Cal. 444, *per* Curry, J. A general restraint upon the alienation of a vested remainder in fee is as ineffectual as a similar restraint in case of an estate in possession; as where a testator devises to his wife for life, remainder to his children, "always intending and meaning that none of his children shall dispose of their part of the real estate in reversion before it is legally assigned them:" *Hall v. Tufts*, 18 Pick. 455.

GENERAL RESTRAINT OF ALIENATION OF ESTATE TAIL.—In *Sir Anthony Mildmay's Case*, 6 Co. 41, "it was resolved that if a man makes a gift in tail on condition that he shall not suffer a common recovery, that this condition is repugnant to the estate tail and against law, one of the incidents of an estate tail being that the tenant in tail may suffer a common recovery." And it is, accordingly, well settled that a condition in a conveyance or devise that a tenant in tail shall not alienate or bar the entail is void, being repugnant to the estate conveyed or devised: Leake's Dig. of Law of Real Property, pt. 2, c. 1, sec. 6, § 3; *Bradley v. Peixoto*, 3 Ves. 324; *Hawley v. Northampton*, 8 Mass. 37, *per* Parker, J.; *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61, *per* Christiany, J.; *Yard's Appeal*, 64 Pa. St. 95. Such a condition would create a perpetuity: *Hawley v. Northampton*, *Mandlebaum v. McDonell*, *supra*. So it is held in *King v. Burchell*, 1 Edin, 424; S. C., 1 Amb. 379, that a provision in a devise of an estate tail charging a certain sum in favor of the person next entitled, if the tenant in tail or any of his issue shall alienate, mortgage, or incumber the estate, is void. Lord Keeper Northington in that case thought the point to be too plain for argument.

GENERAL RESTRAINT ON ALIENATION OF LIFE ESTATE.—In *Brandon v. Robinson*, 18 Ves. 429, Lord Eldon lays it down that where a life estate is given, the donor can not take away the incidents of such an estate by a restraint upon the power of disposal. To the same effect is the opinion of Sir G. J. Turner, V. C., in *Rochford v. Hackman*, 9 Hare, 480. So it was held in *Pace v. Pace*, 73 N. C. 119, that an absolute restraint on the power of disposal of a devisee of a life estate in certain property was invalid, there being no limitation over; see also *Tillinghart v. Bradford*, 5 R. I. 205. But in *Nichols v. Eaton*, 91 U. S. 725, Miller, J., delivering the opinion, denies the doctrine of Lord Eldon in *Brandon v. Robinson*, *supra*, "that the power of alienation is a necessary incident of a life estate in real property," and holds that a testator devising such an estate may lawfully prohibit the life tenant from alienating it. So it is laid down by Sir Thomas Plumer, M. R., in *Wilkinson v. Wilkinson*, 3 Swans. 515, that a provision in a will of a life estate or annuity that it is given on the express condition that if the donee shall "assign or dispose of or otherwise charge" his interest therein such interest shall cease and determine, is valid. In the course of the opinion he says: "With respect to the validity of the proviso, it is clear that a testator may thus modify the estate he gives: *Wilson v. Greenwood*, 1 Id. 481, and note; for though, in a case which has been mentioned, *Brandon v. Robinson*, 18 Ves. 429; S. C., 1 Rose, 197, it is stated as the opinion of a very great judge, that if an estate is given for life, the incidents to a life estate can not

be taken away, and though it is better, therefore, when such a limitation is intended, to give the estate until bankruptcy or alienation, and not first to give it for life, and then to prohibit the attempt to alien, yet this is answered by considering that, in a will, any condition or modification may be annexed which does not offend against any rule of law; and it is immaterial by what form of words the intention is executed, whether by a devise until the devisee shall have charged or incumbered it, or by a proviso with a limitation over upon such an event. Each mode is equally valid and of the same effect. Cases respecting restraints on alienation have frequently arisen, and some are of considerable antiquity; they are to be found in Dyer, 6 a, in 1 Anderson, 123, 124, and in 1 Leon. 3, and 2 Id. 82; the modern books are full of them; and although the courts look with a jealous eye on such restraints, yet it is now clear that he who gives may annex such conditions to his gift." So it is held by Sir G. J. Turner, V. C., in the valuable case of *Rochford v. Hackman*, 9 Hare, 480, that a provision in a will that a life estate given thereby shall be determined by an alienation thereof is valid, whether there is a limitation over or not. So in *Camp v. Cleary*, 76 Va. 140; S. C. 14 Cent. L. J. 138, the supreme court of Virginia hold that a condition in a deed of gift of a life estate in land, that if the grantee aliens or attempts to alien it he shall forfeit it, together with other lands given in fee by the same will, and that the same shall vest in other persons, is valid, as a conditional limitation.

APPLICATION OF RULE TO CHATTEL INTERESTS AND TRUST ESTATES.—In *Woodmeston v. Walker*, 2 Russ. & M. 204, Lord Chancellor Brougham says: "The rule of law which prevents a party from imposing fetters upon property inconsistent with the nature of the estate given is precisely the same, I apprehend, in personal as in real estate." A condition in a bequest of dividends of stock to A. for his support for life, and at his death to his heirs, executors, administrators, and assigns, that if he should attempt to assign or dispose of said stock his right thereto should be forfeited and go to others, was held repugnant to the gift, and void: *Bradley v. Peixoto*, 3 Ves. 324; *Borton v. Borton*, 16 Sim. 559. But where in a devise of dividends of stock to A. for life, or, if he should die, then to his wife for life, there was a provision that when the youngest child came of age the stock should be sold and the money divided among the children, and that any alienation or parting with the interest before that time by any of the children should forfeit the share of the one so alienating, such provision was held valid, because the estate of the alienor was contingent: *Churchill v. Marks*, 1 Coll. 441. And where an annuity was charged on realty for A. for life, payable to him only, and to cease immediately on alienation, the condition was held valid: *Dommell v. Bedford*, 3 Ves. jun. 149.

The rule forbidding restraints on alienation has been held to apply also to equitable estates. Thus, where a conveyance was made of lands and slaves upon trust to apply the rents and profits to the benefit of the *cestui que trust* for life, so that they should not be "sold or disposed of, or anticipated by him," there being no limitation over in case of an attempted alienation, the condition was adjudged void: *Dick v. Pitchford*, 1 Dev. & B. Eq. 480. In that case, Gaston, J., delivering the opinion, said: "The power of alienation is a legal incident of ownership. It is familiar doctrine, that if a feoffment, grant, release, confirmation, or devise be made upon condition not to alienate the estate, or if a term for years or chattel personal be granted upon condition not to assign, such conditions are altogether nugatory. The doctrine obtains not less in courts of equity, acting upon those interests which are the proper subject-matter of their jurisdiction, than in courts of law adjudicating upon legal interests. A departure from it would produce useless confusion."

and innumerable mischiefs. The capricious regulations which individuals would fain impose on the enjoyment and disposal of property must yield to the fixed rules which have been prescribed by the supreme power as essential to the useful existence of property. If under the settlement a legal estate had been limited to Hesekiah Pitchford [the *cestui que trust*] for life, he would have taken the estate as one in its nature alienable; and the prohibition against alienation would have been absolutely void. The exclusive right enforced through the trust imposed on the legal proprietor to receive the profits of the property thereby conveyed is, in equity, the estate in that property; and equity must hold a prohibition to dispose of what is his as wholly inoperative." But where an estate was devised to trustees in trust to pay a certain sum out of the rents and profits annually for the maintenance of the children of the testator's son, the surplus to be paid to the son for life, but so as he should not have power to alienate or charge the same, and that if the son should in any manner impede or frustrate the trusts of the will the surplus should no longer be paid to him, but should be accumulated for his children, the condition was held valid: *Lewes v. Lewes*, 6 Sim. 304. So where a share of a trust fund was bequeathed in trust for a certain person, his executors, administrators, and assigns, providing that if during the lives of certain other persons he should assign, charge, or otherwise dispose of his share, or attempt to do so, his interest should cease, and the trustees should hold the same in trust, to apply to the support of himself and family during the lives of the persons named, and after their deaths to settle and assure said share for the benefit of the said party and his family, the condition was held valid: *Kearsey v. Woodcock*, 3 Hare, 185. And generally, it is certain that property may be given to trustees in trust for a person until he shall dispose of it, and then over: *Lockyer v. Savage*, 2 Stra. 947; Williams Real Prop. 87. Other cases illustrative of this point are cited in the next division of this note.

CONDITION THAT PROPERTY DEVISED OR CONVEYED SHALL NOT BE SUBJECT TO DEBTS of the devisee or grantee is ordinarily a condition in restraint of alienation, and therefore void: *Blackstone Bank v. Davis*, 21 Pick. 42; *Mebane v. Mebane*, 4 Ired. Eq. 131; *McCleary v. Ellis*, 54 Iowa, 311; S. C., 37 Am. Rep. 205; *Jones' Will*, 23 L. T., N. S., 211; *Graves v. Dolphin*, 1 Sim. 66; *Snowden v. Dales*, 6 Id. 524. Thus where an annuity was given which was declared not to be liable to the debts of the donee, but was to be paid into his own proper hands, it was held that it nevertheless passed to his assignees in bankruptcy, on the ground that he could not keep it and not pay: *Graves v. Dolphin*, 1 Sim. 66. So in *Tillinghast v. Bradford*, 5 R. I. 205, it is said that "no man should have an estate to live on, but not an estate to pay his debts with." And where a certain residuary property was devised equally to the testator's nephews and nieces, providing as to the share of one of the nephews that the trustees should hold it for him for his life and pay him the interest and proceeds as they accrued, and that if his share should become liable to be seized by any of his creditors, or if he should become bankrupt or should alien or mortgage the same, his interest should immediately cease and go to his sisters, it was held not a conditional limitation, but a condition in restraint of alienation, and therefore void: *Jones' Will*, 23 L. T., N. S., 211. So where a sum of money was assigned to trustees in trust during B.'s life, etc., to pay the interest to him or lay it out for his support, but so as not to be subject to his debts, and after his death all the savings, etc., to be in trust for his children, upon B.'s becoming bankrupt it was held that his life interest passed to his assignees, there being no clear gift over: *Snowden v. Dales*, 6 Sim. 524. So where property was devised in trust for

the testator's son, providing that it should not in any event be subject to his debts, the provision was held to be a nullity: *Mebane v. Mebane*, 4 Ired. Eq. 131. In that case Ruffin, C. J., delivering the opinion, said: "Terms of exclusion of the donee's creditors, not amounting to a limitation of the estate, can no more repel the creditors than a restraint upon alienation can tie the hands of the donee himself. Liability for debts ought to be, and is, just as much an incident of property as the *jus desponendi* is; for, indeed, it is one mode of exercising the power of disposition." But there is no doubt that a testator may bequeath property for the benefit of the donee personally, and yet so that no creditor shall take any advantage from it: 2 Redf. Wills, 290, 301, 302, and cases cited; *Braman v. Stiles*, 2 Pick. 463. Thus an estate for life, or an absolute estate, or an annuity may be given so as to cease upon alienation or bankruptcy, or upon being seized for debt: *Rochford v. Hackman*, 9 Hare, 475; *Brandon v. Robinson*, 18 Ves. 42; *Graves v. Dolphin*, 1 Sim. 66; *Wilkinson v. Wilkinson*, 3 Swans. 515; *Bramhall v. Ferris*, 14 N. Y. 41.

In *Nichols v. Eaton*, 91 U. S. 725, it is distinctly and emphatically laid down that a provision in a will giving a life estate in land, that it shall not be alienated or subject to the devisee's debts, is entirely valid; and Mr. Justice Miller, after stating, as heretofore noticed, that he does not agree with the doctrine of *Brandon v. Robinson*, 18 Ves. 433, that the power of alienation is a necessary incident of a life estate, says further, that he does not see "that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English chancery court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, can not so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court." The prevailing doctrine in this country is that a trust estate may be created for one's benefit for life by deed or will providing that the income shall be paid to him for his support or that of his family, and that it shall not be subject to his debts by voluntary charge or otherwise: *Pope v. Elliott*, 8 B. Mon. 56; *Braman v. Stiles*, 2 Pick. 460; *Hill v. McRae*, 27 Ala. 175; *Fisher v. Taylor*, 2 Rawle, 33; *Vaux v. Parke*, 7 Watts & S. 19; *Shankland's Appeal*, 47 Pa. St. 113; *White v. White*, 30 Vt. 338; *Perkins v. Dickinson*, 3 Gratt. 335. In *Fisher v. Taylor*, *supra*, the testator directed his executors to purchase land and hold it in trust for his son, who was to have the rents and profits, but the same were not to be liable for his debts, and at his death the land was to go to his heirs, and in default of such heirs, to the testator's heirs, and these provisions were held valid and the land not subject to execution for the son's debts. Smith, J., delivering the opinion, said: "A man may undoubtedly so dispose of his land as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust

estate, explicitly designating the uses, and defining the powers of the trustees. All this we think has been sufficiently effected in the case under consideration. Nor is such a provision contrary to the policy of the law or to any act of assembly. Creditors can not complain, because they are bound to know the foundation upon which they extend their credit." Where a father devised in trust for his sons until they became free of debt, providing for a division and setting off to each of his share as he became free of debt, it was held that the provision did not import a restraint on alienation, but merely limited the interest upon the happening of the contingency, and that until the sons were free of debt they took no interest subject to the claims of their creditors: *Bank of State v. Forney*, 2 Ired. Eq. 181.

PARTIAL RESTRAINTS ON ALIENATION.—Conditions in a gift or devise that the donee or devisee shall not alien for a particular time or to certain persons or to any but certain persons have been held to be valid if reasonable, even where a fee-simple estate was given: 1 Wash. Real. Prop. 54; Boone Real Prop., sec. 17; 2 Redf. Wills, 288; 17 Cent. L. J. 189; *McWilliams v. Nisly*, 7 Am. Dec. 656; *Langdon v. Ingram's Guardian*, 28 Ind. 360; *Simonds v. Simonds*, 3 Met. 562. As where a testator devised to his wife until his son William should come to the age of twenty-two, remainder after that event to certain other sons, providing that if any of his said sons before that period should "go about" to sell his share he should forfeit the same: *Larye's Case*, 2 Leon. 82; S. C., 3 Id. 182, distinguished, *per Christiany*, J., in *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61, as a case of contingent remainder. So where an estate was devised in fee, conditioned that it should "in no way be disposed of by deed of gift or sale" until the devisee arrived at the age of thirty-five: *Stewart v. Brady*, 3 Bush, 623; see also *Stewart v. Barrow*, 7 Id. 368. So where land was given by a deed of gift to certain minors upon condition not to alien or incumber it until the youngest of the donees should attain the age of twenty-five, which was the age of majority under the Spanish law there prevailing: *Dougal v. Fryer*, 22 Am. Dec. 458. So in case of a devise to a daughter on condition not to alien to any but her sisters if she should have no issue: *Doe d. Gill v. Pearson*, 6 East, 173; S. C., 2 Smith, 295. So in a case of a devise to the testator's brother on condition never to sell "out of the family": *In re Macleay*, L. R., 20 Eq., 186. In that case Sir G. Jessel, M. R., delivering the opinion, after stating that the test was whether or not the condition took away all power of alienation, said: "Now you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all these ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remote-

ness under another rule. So that this is strictly a limited restraint on alienation, and unless Coke upon Littleton has been overruled or is not good law, this is a good condition."

On the other hand, where a will provided that certain real estate should remain unsold until one of the devisees should attain the age of twenty-five, or, in case of the death of such devisee, until twenty-one years after the date of the will, the condition was held void: *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61, examining nearly all the prior cases on this point. So where the condition was against alienation until twenty-five years after the testator's death, the condition was held void as savoring of perpetuity: *Oxley v. Lane*, 35 N. Y. 347. So where, in a devise in fee, there was a condition that the devisees should not be allowed to sell, dispose of, or incumber the land devised to them until the expiration of ten years after the testator's youngest son should arrive at full age, the condition was held void: *Anderson v. Cary*, 36 Ohio St. 506; S. C., 38 Am. Rep. 622. A condition to sell only to a particular person was adjudged void in *Attwater v. Attwater*, 18 Beav. 330; S. C., 18 Jur. 50; S. C., 23 L. J. Ch. 692. In that case Sir J. Romilly, M. R., said: "It is obvious that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person who alone is permitted to purchase might be so selected as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all. It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all." In *Schermerhorn v. Negus*, 1 Denio, 448, a condition in a devise of a remainder in fee to the testator's children was that no part of the land should be sold or alienated by any of the said children, "or by any of their descendants or posterity, except it be to each other, or to their and each of their descendants," on pain of forfeiture, and the condition was held void as to those taking a fee under the will. It certainly would seem, upon principle, that a partial restraint upon alienation is just as obnoxious to the idea of complete ownership as a general restraint. If a perpetual prohibition upon the alienation of a fee is repugnant to the estate, why is not a prohibition for a single day equally so? See on this point the valuable observations of Judge Christiany in *Mandlebaum v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61.

NECESSITY OF GIFT OVER TO VALIDATE RESTRAINT ON ALIENATION.—In several of the cases already referred to, attempted restraints upon alienation have been held invalid because there was no limitation over in case of alienation. Other cases to the same effect may be mentioned. In *Woodmeston v. Walker*, 2 Russ. & M. 204, it was held that to make a clause against anticipation of an annuity effectual, there must be a gift over. Lord Chancellor Brougham said: "If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee and create a new interest in another." So in a devise for life forbidding disposal by the devisee, the prohibition was held nugatory, because there was no limitation over, in *Pace v. Pace*, 73 N. C. 119, where the court say: "It is settled that by no form of words can property be given to a man, or to another in trust for him, so that he shall not have a right to dispose of his estate in it, unless there be in the instrument of gift a provision that upon an attempted alienation it shall go over to some other person." So held, also, in case of a devise to trust,

tees in trust to pay the income of the estate to the testator's son for life, and at his death to convey pursuant to his appointment, or in default of appointment, to his heirs, prohibiting any alienation or anticipation by him without limitation over: *Tillinghast v. Bradford*, 5 R. I. 205. Indeed, it may be laid down as a general rule, that unless there is a reversion or limitation over to secure obedience to a prohibition against alienation, it is wholly nugatory. It could not be otherwise, as Mr. Justice Christiany shows in *Mandibam v. McDonell*, 29 Mich. 78; S. C., 18 Am. Rep. 61, because without such reversion or limitation over there would be no one to insist upon obedience. Besides, while a naked restraint on alienation is repugnant to the legal idea of ownership in general, there is nothing objectionable, at least in theory, in making the limitation of a subsequent estate depend upon a prohibited alienation by a prior taker if the limitation be not too remote, and be not in itself inconsistent with the nature of the prior estate.

CONDITIONS AGAINST ALIENATION ARE STRICTLY CONSTRUED, and even if they would otherwise be valid, are ineffectual unless certainly and clearly expressed. A provision restraining the donee or devisee of an estate from "going about" touching any alienation, or "attempting" or "offering" to alienate, or the like, is ordinarily void for uncertainty if not aided by other words: *Sir Anthony Mildmay's Case*, 6 Co. 42; *Pierce v. Win*, 1 Vent. 321; S. C., Pol. 435; *Brothers v. McCurdy*, 36 Pa. St. 407. But a prohibition against an "attempt" to alienate was held not too indefinite, in *Brandon v. Aston*, 2 You. & Coll. C. C. 28.

CONDITION OR COVENANT IN LEASE FOR YEARS OR LIFE NOT TO ASSIGN, alienate, or part with the lease or the premises without license, though forfeiture is provided as the penalty, is unquestionably valid: *Wood on Land. & Ten.*, sec. 323; 3 Jur., N. S., 311; *Roe v. Galliers*, 2 T. R. 238; *Morgan v. Slaughter*, 1 Esp. 8; *Doe v. Bevan*, 3 Man. & Sel. 353; *Church v. Brown*, 15 Ves. 263; *Hargrave v. King*, 5 Ired. Eq. 430. "It is reasonable," says Ashurst, J., in *Roe v. Galliers*, 2 T. R. 238, "that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate." It is on the ground that the lessor continues to be the owner that he has the right, if he pleases, to reserve the privilege of determining who shall occupy his land. A covenant of this sort is said, in *Morgan v. Slaughter*, 1 Esp. 8, to be "a fair and usual covenant." So in *Folkingham v. Craft*, 3 Anst. 700, a covenant not to assign was held to be implied in an agreement for a lease with "all usual and reasonable covenants." But in *Church v. Brown*, 15 Ves. 258, it is said not to be a usual covenant, and that a lessor is not entitled to it without an express stipulation. If the covenant or condition is not to assign without license in writing, parol license will not do: *Roe v. Harrison*, 2 T. R. 425. Such covenants and conditions in leases, however, are not favored, but are regarded with the utmost jealousy: *Crusoe v. Bugby*, 2 W. Black. 768; *Church v. Brown*, 15 Ves. 258, 265; *Livingston v. Stickles*, 7 Hill, 255; *Chipman v. Emeric*, 5 Cal. 49. They are always strictly construed: *Jackson v. Silvernail*, 15 Johns. 278. It was settled in *Dumpor's Case*, 4 Co. 119; S. C., 1 Smith's Lead. Cas., 6th Am. ed., 89, that a condition in a lease not to assign without license was destroyed forever where license was once given even as to part of the premises. This decision, though often animadverted upon, was always acquiesced in in England until the rule laid down was abrogated by statute 22 & 23 Vict., c. 35, sec. 1: *Wood on Land. & Ten.*, sec. 323; *Dumpor's Case*, 1 Smith's Lead. Cas., 6th Am. ed., 91, note; *Doe v. Blise*, 4 Taunt. 735; *Brunnell v. Macpherson*, 14 Ves. 173. *Dumpor's Case* is approved and followed in *Chipman v. Emeric*, 5 Cal.

49. A covenant that neither the lessee nor his assignees will assign runs with the land: *Williams v. Earle*, 9 Best & S. 740. Where the lessee covenants not to assign without leave, but does so assign, his assignee may, by assigning, escape liability for rent: *Paul v. Nurse*, 8 Barn. & Cress. 486. A fine on alienation in a lease for life or years is also valid: *Livingston v. Stickles*, 7 Hill, 253; *Overbagh v. Patrie*, 8 Barb. 36.

RESTRAINTS ON ALIENATION OR ANTICIPATION BY FEMES COVERT respecting property settled to their separate use, in the instrument conferring the separate use, are also an exception to the general rule against restraints on alienation, and are undoubtedly valid: 1 Bish. Mar. W., sec. 844; Schouler on Husb. & W., sec. 202; *Jackson v. Hobhouse*, 2 Meriv. 483; *Pybus v. Smith*, 3 Bro. C. C. 340; *Brandon v. Robinson*, 18 Vea. 429; *Barton v. Briscoe*, Jac. 605; *Woodmeston v. Walker*, 2 Russ. & M. 205; *Baggett v. Meux*, 1 Coll. 138; S. C., 8 Jur. 391; S. C., 13 L. J. Ch. 228; *Tullett v. Armstrong*, 4 Jur. 34; *Robinson v. Wheelwright*, 6 De G. M. & G. 535; *Weeks v. Sego*, 9 Ga. 199; *Dirk v. Pitchford*, 1 Dev. & B. 484; *Mebane v. Mebane*, 4 Ired. Eq. 133, *per Rufin*, C. J.; *Shoak v. Brown*, 61 Pa. St. 320; *Perkins v. Hays*, 3 Gray, 405; *Nixon v. Rose*, 12 Gratt. 425; *Radford v. Carwile*, 13 W. Va. 572. The reason for this exception is that the separate estate being a creation of equity, the courts of equity claim the right to mold it so as to effectuate the object intended by securing the estate to the beneficiary against the practices of her husband. But a restraint on alienation in a gift to the separate use of a *feme sole* is void where there is no gift over, as in the case of any other person *sui juris*: *Newton v. Reid*, 4 Sim. 141; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Brown v. Pocock*, 2 Id. 210. But if she afterwards marries before alienation, the restraint, it seems, becomes effectual: *Tullett v. Armstrong*, 1 Beav. 1; S. C., 4 Jur. 34. And where the gift is to one who is a *feme covert* at the time, but afterwards becomes *discovert*, the restraint is at an end: *Jones v. Salter*, 2 Russ. & M. 208; *Barton v. Briscoe*, Jac. 603. And if she marries again, the restriction is not revived: *Humersley v. Smith*, 4 Whart. 128.

CONDITIONS IN RESTRAINT OF ALIENATION IN DEVISES TO CHARITY are also valid, because it is the normal character of charity property to be inalienable: *Jones v. Habersham*, 3 Wood, 443; *Stanley v. Colt*, 5 Wall. 119; *Perin v. Carey*, 24 How. 465; *Yard's Appeal*, 84 Pa. St. 95.

CONDITION IN GRANT IN FEE, FOR PAYMENT OF RENT, WITH RIGHT OF RE-ENTRY for non-payment, is not a restraint upon alienation, or in any way repugnant to the estate, and is valid: *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Ball*, Id. 102; *Van Rensselaer v. Dennison*, 35 Id. 400; *Van Rensselaer v. Barringer*, 39 Id. 14; *Central Bank v. Heydorn*, 48 Id. 268, *per Hunt*, commissioner, dissenting; *Cagger v. Lansing*, 64 Id. 431; *Main v. Green*, 32 Barb. 454, all citing the principal case as admitting, or at least as not denying, the validity of such a condition. That a conveyance or lease in fee reserving rent operates as an assignment and not as a lease, and leaves no estate, reversion, or possibility of reverter in the grantor, is a point to which the principal case is cited in *Tyler v. Heidorn*, 46 Barb. 449; *Lyon v. Adde*, 63 Id. 96; *Van Rensselaer v. Read*, 26 N. Y. 653; *Van Rensselaer v. Dennison*, 35 Id. 399. And a claim of possession under a lease of this kind is tantamount to a claim of a title in fee: *Bedell v. Shaw*, 59 Id. 51.

WHAT CONSTITUTES ALIENATION OR TRANSFER VIOLATING CONDITION. Where a condition against alienation is valid, it is a question of some importance as to what will constitute such an alienation as will be a breach of the condition. Making a lease for sixty years, and so from sixty years to sixty

years until two hundred and forty years be passed, has been held a violation of a condition not to "sell: " *Large's Case*, 2 Leon. 82; S. C., 3 Id. 182. Where a will giving a life interest in an estate provides against assigning or charging, or attempting to assign or charge it, an agreement by the devisee of the estate to charge a debt thereon in case of the deficiency of another estate, or a power of attorney given by such devisee authorizing the receipt of the rents and profits of the life estate in discharge of the debt, is a breach of the provision, and determines the life estate: *Wilkinson v. Wilkinson*, 3 Swans. 515. But where property was given with a proviso for its forfeiture and a gift over in case of alienation, giving a warrant of attorney to confess judgment was held no alienation, so as to work a forfeiture, if not given as a contrivance to evade the restraint: *Arison v. Holmes*, 1 Johns. & H. 530. So in case of a covenant in a lease not "to let, set, assign, transfer, make over," etc.: *Doe v. Carter*, 8 T. R. 57, 300. Outlawry, operating an involuntary alienation, works no forfeiture of an annuity bequeathed as an inalienable provision for the annuitant's personal use and support, not subject to be alienated or anticipated, or liable to his debts, control, or engagements, with a proviso that if he should sell, assign, transfer, or make over, demise, mortgage, charge, or otherwise attempt to alienate said annuity, or do any act, deed, matter, or thing to charge, alienate, or affect the same, it is to be suspended: *Rex v. Robinson*, Wightw. 386. The prohibition was held to lie only against voluntary acts of the party. So bankruptcy was held, upon similar principles, not to work a forfeiture of a bequest of stock in trust for the life of A., and after his death for his children, with a proviso that his life interest should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever; and in case he should charge or affect to charge, affect or incumber the same, his life interest should be forfeited, and the stock should go to those next entitled: *Lear v. Leggett*, 1 Russ. & M. 690. And it was decided that the bankrupt's interest passed to his assignees. A similar conclusion was reached in *Pym v. Lockyer*, 12 Sim. 394, where the provision of the will was that if the person to whom the life interest was given should assign or otherwise dispose of the same, the fund should go over. See also *Brandon v. Robinson*, 18 Ves. 429. But in *Dommett v. Bedford*, 3 Id. 149, the bankruptcy of the annuitant was held to terminate an annuity charged on realty for his life, payable to him only upon his own receipt, and not to be alienated, and if alienated, to cease immediately. A covenant or proviso in a lease not to assign without license is not violated by an involuntary assignment under the bankrupt act: *Weatherall v. Geering*, 12 Ves. 504. Where a lease is given for a specified term if the lessee and his executors shall so long continue to occupy the premises, but to terminate if he shall "let, set, assign over, or otherwise depart with" the lease, such lease is forfeited where the lessee becomes bankrupt, and his assignees take possession of the premises and sell the lease: *Doe v. Clarke*, 8 East, 183. Not so where the covenant in a lease is merely that the lessee, his executors, administrators, or assigns, shall not assign the lease, or his interest therein or in the premises, and the lessee becomes bankrupt, and his assignees assign the lease by order of the court: *Doe v. Beran*, 3 Mau. & Sel. 353. A covenant, condition, or proviso in a lease against assignment thereof does not prevent subletting: *Crusoe v. Bugby*, 2 W. Black. 766; *Church v. Brown*, 15 Ves. 258, 265; *Hargrave v. King*, 5 Ired. Eq. 430. Nor is a sublease of part of the premises a breach of a covenant in a lease not "to sell, dispose of, or assign" the lessee's interest in the demised premises: *Jackson v. Silvernail*, 15 Johns. 278. Nor is a sublease of part for part of the term only a breach of a

condition not to "assign over or otherwise part with the indenture or the premises thereby leased, or any part thereof, to any person:" *Jackson v. Harrison*, 17 Id. 66. But a proviso in a lease not to assign or otherwise part with the lease or the premises, or any part thereof, for the whole or any part of the term, is broken by a sublease: *Doe v. Worsley*, 1 Camp. 20. So also a sublease by the lessee's administrator is a breach of a provision that the lessee or his administrators shall not "set, let, or assign over" the whole or any part of the premises: *Roe v. Harrison*, 2 T. R. 425. A devise is a breach of a provision in a lease against assignment: *Knight v. Mory*, Cro. Eliz. 60; or of a condition not to demise for a longer term than from year to year: *Berry v. Taunton*, Id. 331. A deposit of a lease as security for a loan is not, it seems, a breach of a covenant not to let, set, assign, transfer, set over, or otherwise part with "the lease or the premises:" *Doe v. Laming*, Ry. & M. 36; *Doe v. Hogg*, 4 Dow. & Ry. 226.

HEIRS OF ALIENOR ARE ESTOPPED TO DENY VALIDITY OF ALIENATION
made in violation of restrictions in the conveyance under which such alienor held where the restrictions are subsequently removed: *McWilliams v. Nisly*, 7 Am. Dec. 654.

NICHOLSON v. LEAVITT.

[6 NEW YORK (2 SELDEN), 510.]

ASSIGNMENT FOR BENEFIT OF CREDITORS, GIVING TRUSTEE DISCRETIONARY POWER TO SELL ON CREDIT, is void, because it tends to delay creditors by embarrassing their right to have an immediate conversion of the property into cash.

INTENT TO HINDER AND DELAY CREDITORS BY ASSIGNMENT for the benefit of creditors renders it fraudulent and void, but not so merely incidental delay.

APPEAL from a judgment of the New York superior court dismissing a creditor's suit. The suit was brought to annul voluntary assignments for benefit of creditors, with preferences, because they contained a power to the trustees to sell the property "for cash or upon credit, or partly for cash and partly upon credit, as they should think proper." The superior court sustained the assignments, and dismissed the suit, and the complainants, judgment creditors, appealed.

Charles O'Conor, for the appellants.

Samuel Beardsley, for the respondent.

By Court, GARDINER, J. The only question which I propose to consider is, whether a provision authorizing a credit in the discretion of the trustees, upon the sale of the property, avoids the trust as to the complainant, a judgment creditor.

One of the express trusts authorized by statute is "to sell

lands for the benefit of creditors." Trusts of personal property are tolerated by our law for the same object. The power to create a trust of real or personal property, or, as in this case, of both, must be construed in the light of other provisions of the common law and the statutes of this state. One of these statutes prescribes that every assignment of any interest in lands, goods, or things in action, made with intent to hinder, delay, or defraud creditors of their lawful suits, damages, debts, or demands, shall, as against the persons so hindered, delayed, etc., be void: 2 R. S. 137, sec. 1. Another, that all assignments of goods, etc., in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such persons: Id. 135, sec. 1.

These statutes are but expositions of the common law: *Cadogan v. Kennett*, 2 Cowp. 432, which, in addition, imposes upon the debtor the obligation to pay his debts as they become due. These various provisions of law must stand together, and each should be so interpreted as to preserve the rights of the debtor, without essentially affecting his obligations to his creditors. The legislature have conferred upon the debtor the right to create a trust of his property for certain purposes. He may also prefer one creditor to another. Of course, the "delay" to creditors, necessarily resulting from a fair exercise of these rights, is not prohibited by any statute; but this delay must be incidental and necessary to the existence of the trust or the exercise of the power. Where it becomes the principal motive for the creation of the one or the exercise of the other, the conveyance made and thing done in pursuance of such intent, if any injury does or may thereby result to creditors, is prohibited by statute, and may be avoided at their instance.

Nothing beyond this was determined in *Meux v. Howell*, 4 East, 1, and in *Wilder v. Winne*, 6 Cow. 287, and other cases to which we have been referred. In the first case, Lord Ellenborough said: "The statute was meant to prevent deeds, etc., fraudulent in their concoction, and not merely such as in their effect might delay or hinder creditors." And in the last, it was held that it could not be left to a jury to decide whether an execution was issued upon a *bona fide* judgment, with an intent to delay other creditors, that such must necessarily have been the intent, the property being insufficient to pay both judgment creditors. Both of these were cases of preference by means of judgments confessed to *bona fide* creditors, who had issued executions and levied upon the insolvent's property. The delay in

each case to other creditors was the necessary result of the preference given, and for that reason lawful.

Indeed, these authorities and others of the same class are not distinguishable in principle from a case in which an insolvent, owing debts of an equal amount to two different creditors with money sufficient to discharge one only, and no other property, pays one demand in full, and omits the other intentionally. No one would imagine in the instance supposed that the debtor and the fortunate creditor, one or both, were liable in a penal action for fraud. The payment of one demand, although the debtor happened to owe two, was right in itself, and precisely what the law required. And although the parties may have foreseen and intended that other creditors should be delayed, the delay would be the incidental consequence of an act perfectly just and legal. But let us suppose that the debtor owed but one debt, and had transferred his property with intent to hinder and delay that creditor, although but for one day, the assignment, if it could have that effect, would be fraudulent and void. The same would be true of a trust giving preferences, but intended to hinder and delay other creditors. In these cases the motives for creating the trust, and the purpose to be affected by it, would be illegal. The delay, instead of being incidental, would be the primary object to be accomplished by its creation. Such an intent, whether manifested by an open or secret trust, avoids the conveyance. There is no case to the contrary, nor can there be without a repeal of the statute.

It was argued that an "intent to hinder and delay creditors, there being no intent to defraud them, will not make an assignment illegal; a positive intent to defraud must exist." The answer to this suggestion is, that a positive intent to defraud always does exist, where the inducement to the trust is to hinder and delay creditors, since the right of a creditor to receive his demand when due is as absolute as the right to receive it at all. It has always been understood that where an individual has incurred an obligation to pay money, the time of payment was an essential part of the contract; that when it arrived the law demanded an immediate appropriation by the debtor, of his property in discharge of his liability, and if he failed, would itself, by its own process, compel a performance of the duty. The debtor, by the creation of a trust, may direct the application of his property, and may devolve the duty of making the appropriation upon a trustee. This the law permits, and such delay as may be necessary for that purpose. But the debtor can not

in this way avoid the obligation of immediate payment, or extend the period of credit without the assent of the creditor. The attempt to do this, however plausible may be the pretense, is in conscience and in law a fraud, a nothing else. It is the fraud which we are asked to sanction, by upholding the trust in question.

These insolvent debtors have authorized their trustees, according to their discretion, to sell the assigned property upon credit. They are to determine when the purchasers shall pay, and of course when the creditors shall receive their dividend. Their power amounts to this, as we shall see, if it amounts to anything. It is hardly necessary to say that what the debtors could authorize, they could direct to be done; and they could have prescribed the period for the credit in the trust deed. Their power in this respect, upon the principles assumed by the court below, is unlimited, if exercised in good faith. The whole argument, independent of authority, in favor of this extraordinary power, resolves itself into this, that without it the property of the debtor may be sacrificed and creditors thereby injured. To this it may be answered, if the trust property is not readily convertible into money, the debtor may dispose of it himself. He is under no obligation to assign. It was not the object of the legislature, as the late chancellor remarked, "to hold out inducements to a debtor in failing circumstances to place his property beyond the reach of creditors;" *Rogers v. De Forest*, 7 Paige, 274. In the second place, if the property is more than sufficient to discharge all the debts of the assignor, he has no right to delay creditors, by giving credit on the sale of the property, with a view to increase the surplus resulting to him; this would be a trust for his own benefit, and consequently void, by the first section of the "act against fraudulent conveyances;" *Hart v. Crane*, Id. 37. If the property is insufficient to pay the demands of creditors, it is obvious that they are chiefly interested in the amount to be realized by the sale. As they must sustain the loss, if there is a deficiency, they should have the right to be consulted and to determine whether their interest will be better subserved by a smaller sum presently received or a larger one at a future period. The rights of the debtor are sufficiently guarded by the privilege which the law gives him of intrusting the sale of his property to trustees of his own selection. That they will consult his interest, whoever else may suffer, is demonstrated by all past experience. Again, the practice of chancery in reference to receivers, and the law authorizing a credit

by certain statutory trustees, administrators, etc., upon the sales of property on account of creditors, have been cited to sustain the views of the respondents. But all these are officers of the law, and not the representatives of the debtor. They are trustees it is true; but their duties are defined by the court or written in the statute. Besides the grant of the power in express terms, in the cases mentioned, is evidence that in the opinion of the legislature, such an authority could not be implied from a mere power to sell, which is the proposition to be established to sustain this assignment.

Neally v. Ambrose, 21 Pick. 185, and *Hopkins v. Ray*, 1 Met. 79, merely determine that the provisions of the particular trusts then before the court, gave to the assignees authority to sell on credit, not that it would be implied from the grant of a power to sell.

In *Hopkins v. Ray*, *supra*, the trustees were authorized "to sell and dispose of the goods in such manner as they should think most advisable, within one year." They thought it advisable to sell on credit, and it was held that they could not be made personally responsible, although the trust was void by the law of Massachusetts. The terms of the assignment in the other case were equally strong. In neither of them was the validity of the trusts themselves in question, and in both the plaintiffs were attaching creditors, not creditors by judgment.

In *Rogers v. De Forest*, 7 Paige, 278, the chancellor observed, "that the express power to sell on credit in that case was a power which is usually implied in trusts of that description, and was not a violation of the revised statutes relative to uses and trusts." And yet, singularly enough, he remarks in the same opinion, that he was "satisfied it was never the intention of the legislature to vest the legal estate in trustees under the first subdivision of the fifty-third section for any other purpose than that of an immediate sale for the benefit of the creditors." The ground upon which this learned jurist upholds a trust to sell on credit is, that the securities taken for the property sold, may, by order of the court, be at once converted into cash. This is also the opinion of the superior court, who seem to have adopted the doctrine and reasoning of the chancellor. But if the debtor can legally direct the trustees to give credit on the sale, it is because the law clothes him with a discretion to determine whether a future payment will or will not be advantageous to his creditors. The court of chancery can not control

that discretion, nor deprive the creditors of the benefits resulting from its exercise, by compelling the trustees to sacrifice the securities taken from the purchasers, in order to raise money for immediate distribution.

This is true of an assignment like the present, where the assignees are clothed with a discretionary authority by the author of the trust. It is, in each case, a question of power under the statute. If the debtor can create such a trust, equity can not interpolate a provision that the fund shall be disposed of, and the money realized according to the discretion of a chancellor. A debtor, for example, or assignees under his authority, determine, as the late chancellor assumes they rightfully may, that the real estate of the insolvent sold on a credit of two years will produce one thousand five hundred dollars, which, if sold for cash, would yield but one thousand. That one thousand five hundred dollars divided among the creditors at the end of that period would be more for their advantage than one thousand presently distributed. He frames a trust accordingly. The trust is valid, and yet a court of equity, that could not compel the trustees to dispose of the land for cash, can yet deprive the creditors of the advantages of a future payment, by compelling the trustee to sell the bond and mortgage received for the real estate to a broker for one thousand dollars in cash, for present distribution. Indeed, the reason assigned by the chancellor for upholding the trust is, in substance, because the court of chancery can annul it at pleasure. I deny that courts possess any such power. If the trust is valid, they are bound to enforce, and not defeat it. That a power of this kind, vested in a debtor, would be most dangerous, the chancellor impliedly admits in claiming jurisdiction to modify and regulate its exercise. Its liability to abuse is, to my mind, a sufficient reason against implying its existence. The same considerations which made the legislature require an immediate sale require an immediate payment also. A discretion may be as judiciously exercised in postponing the time of sale of property as in postponing the time of payment.

In opposition to the authority cited by the respondents, reference may be made to the observations of the chancellor in *Hart v. Crane*, 7 Paige, 37, and in *Meachem v. Stearnes*, 9 Id. 405, to the decision of the supreme court of the second district, in *Burdick v. Post*, 6 N. Y. 522, and to *Barney v. Griffin*, 2 Id. 365. No member of the court dissented from the opinion of Judge Bronson upon this point in that case, although no

decision was made upon it, because none was necessary to the determination in that suit.

The judgment of the superior court must therefore be reversed, and the assignments, containing the provision as to credit, declared fraudulent and void as to the complainants.

RUGGLES, C. J., and JOHNSON, JEWETT, WATSON, and WELLES, JJ., concurred in the foregoing opinion.

EDMONDS, J., delivered a written opinion to the same effect.

Judgment reversed.

CLAUSE IN ASSIGNMENT FOR CREDITORS GIVING TRUSTEE AUTHORITY TO SELL ON CREDIT avoids the assignment, because it inevitably tends to delay the conversion of the assets into money: *Bowen v. Parkhurst*, 24 Ill. 261; *D'Innis v. Leavitt*, 23 Barb. 63, 80; *Lecachijk v. Addison*, 19 Abb. Pr. 181; S. C., 3 Robt. 342; S. C. in court of appeals, 42 N. Y. 429, *per* Sutherland, J., dissenting; *Jessup v. Hulse*, 29 Barb. 542; *Ruhl v. Phillips*, 2 Daly, 49; *Potter v. Clark*, 12 How. Pr. 110; *Wilson v. Robertson*, 19 Id. 351; S. C., 21 N. Y. 589; *Kellogg v. Slawson*, 11 Id. 305; *Brigham v. Tillingshast*, 13 Id. 218; *Carpenter v. Underwood*, 19 Id. 522; *Rapalee v. Stewart*, 21 Id. 318, *per* Emott, J., dissenting; *Gates v. Andrews*, 37 Id. 658; *Grant v. Chapman*, 38 Id. 294, all approving the principal case. So especially where there is also a reservation in favor of the assignor: *Arthur v. Commercial etc. Bank*, 48 Am. Dec. 719. A provision authorizing the trustee to convert the assets into "money or available means," is held in *Brigham v. Tillingshast*, 13 N. Y. 218, to imply a power to sell on credit, and invalidates the assignment. So where the provision was that the trust property should "be converted into cash or otherwise disposed of to the best advantage:" *Rapalee v. Stewart*, 21 Id. 318; but in that case Emott, J., dissented. But on the other hand, the assignee may be expressly forbidden to sell on credit without invalidating the assignment: *Carpenter v. Underwood*, 19 Id. 522; *Grant v. Chapman*, 38 Id. 294.

PROVISION IN SUCH ASSIGNMENT INTENDED TO DELAY or hinder creditors by postponing the conversion of the assets into cash, or which must on the face of it inevitably authorize such delay, will avoid the assignment, being conclusive evidence of fraud: *Curtis v. Leavitt*, 17 Barb. 316; S. C., 15 N. Y. 205; *Jessup v. Hulse*, 29 Id. 539, 542; *People v. Kelly*, 35 Id. 460; *Kavanagh v. Beckwith*, 44 Id. 195; *Townsend v. Stearns*, 32 Id. 216. But not so where the delay is merely incidental to the execution of the trust, and not one of the objects of the assignment: *Belloros v. Partridge*, 12 N. Y. Leg. Obs. 221; *Curtis v. Leavitt*, 17 Barb. 316; S. C., 15 N. Y. 205; *Spaulding v. Strany*, 38 Id. 12; *Hanselt v. Vilmar*, 76 Id. 631. A clause authorizing the assignee to compromise with creditors, if he deems it best, obviously tends to delay, and avoids the assignment: *McConnell v. Sherwood*, 84 Id. 531; S. C., 61 How. Pr. 72; *Gazzam v. Poyntz*, 37 Am. Dec. 745. So a clause authorizing the assignee to continue the debtor's business and to invest funds in the completion of certain machines in course of manufacture: *Dunham v. Waterman*, 17 N. Y. 17; S. C., 6 Abb. Pr. 369. So held also as to an assignment authorizing partnership effects of an insolvent firm to be applied to the individual debts of a partner: *Ruhl v. Phillips*, 2 Daly, 49. So where creditors are attempted to be postponed in the collection of their debts until the debtor's death: *Young v. Heermans*, 66 N. Y. 382. So where the assignee is

authorized to pay part of the creditors each year, those to be paid to be selected by lot, or to depart from the order of settlement from time to time, and pay creditors in full or in part: *Moore v. New Orleans*, 32 La. Ann. 759, *arguendo*; *Gazzam v. Poyntz*, 37 Am. Dec. 745. So held also as to a provision authorizing the assignee to "sell, dispose of, and convey" the assets "at such time or times and in such manner as shall be most conducive to the interests of the creditors, etc., and convert the same into money as soon as may be consistent with the interests of said creditors:" *Jessup v. Hulse*, 29 Barb. 539, 542; *contra*: *Townsend v. Stearns*, 32 N. Y. 216. So also as to a clause authorizing the assignee to sell "upon such terms and conditions as in his judgment may be best," etc.: *Shufeldt v. Abernethy*, 12 N. Y. Leg. Obs. 176; *contra*: *Kellogg v. Slawson*, 11 N. Y. 305. A clause authorizing the assignee to sell at public or private sale does not invalidate an assignment: *Lord v. Devendorf*, 54 Wis. 491. In all the foregoing cases, except those cited from the American Decisions, *Nicholson v. Leavitt* is referred to with approval, though sometimes distinguished. In *In re Lewis*, 81 N. Y. 424; S. C., 59 How. Pr. 252, the case is cited to the point that an assignee for the benefit of creditors is merely the representative of the debtor, and must be governed by the express terms of the trust.

BROWN v. BLYDENBURGH.

[7 NEW YORK (3 SKELTON), 141.]

MORTGAGE REMAINS EQUITABLE LIEN UPON LANDS in favor of an assignee of the bond and mortgage, to whom it was assigned, as collateral security for a loan made by him to the mortgagee, notwithstanding the mortgagee afterwards receives a conveyance of the premises from the mortgagor, and gives him, in consideration thereof, an acquittance of the bond and mortgage.

APPEAL from a judgment affirming a vice-chancellor's decree n^o. foreclosure of mortgage. The facts are stated in the opinion. The ground on which the supreme court (in an opinion not reported) sustained the foreclosure was that payment of the mortgage was not asserted, and there was no merger of the estates, because at the time when the mortgagee acquired the fee he was not the owner of the mortgage, having previously assigned it to complainant. The decree charged the mortgagor with payment of any deficiency.

Jeremiah W. Blydenburgh, the appellant, the mortgagor, in person.

David Dudley Field, for the respondents.

By Court, RUGGLES, C. J. The mortgage sought to be foreclosed was executed on the third of August, 1839, by Jeremiah W. Blydenburgh to Richard F. Blydenburgh, for three thousand

four hundred and ninety-seven dollars and thirteen cents, payable on the first of March, 1840. The mortgagee assigned it to William C. Atwell on the fifth of August, 1839. Atwell assigned it to Calder on the seventeenth of March, 1840, to secure the payment of two hundred and fifty dollars. On the seventeenth of March, 1840, Calder assigned it to the plaintiffs to secure the payment of the like sum.

J. W. Blydenburgh, by deed bearing date May 4, 1840, executed in presence of J. F. Searing, and acknowledged before him, as commissioner of deeds, on the first day of October of that year, conveyed the mortgaged premises to William C. Atwell in fee. The deed contained the usual full covenants. On the same day (October 1, 1840) Atwell made a certificate acknowledging that the mortgage in question was paid. This certificate was acknowledged on the same day before the same commissioner. The deed and certificate, therefore, seem to be part of one and the same transaction, both executed on the first of October. Looking at the affair in this light, it appears that J. W. Blydenburgh conveyed the land to W. C. Atwell in satisfaction of the mortgage.

It was clearly a fraud on the part of Atwell to give this certificate of satisfaction; because he had previously assigned the mortgage to Calder, and knew that he had no authority to discharge it.

J. W. Blydenburgh sets up in his answer (not under oath) that he paid the mortgage money to Atwell in good faith, and without notice of the assignment to Calder. But there is no proof of the payment of any money by Blydenburgh to Atwell. It appears that he conveyed him the land; and in Atwell's hands the land is clearly chargeable with the payment of the complainant's debt, and neither W. C. Atwell nor George Atwell, to whom the land was afterwards conveyed, has appealed from the decree. The only ground, therefore, if there be any, on which J. W. Blydenburgh can complain of the decree is, that he is charged with the payment of the deficiency in case the mortgaged premises should fail to bring upon a sale a sum sufficient to satisfy the complainant's demand. Judging of the value of the land from the amount of the purchase money expressed in the deed, the amount of the plaintiffs' demand is so small as to show that objection to the decree to be rather formal than substantial. But were it otherwise, the decree ought not to be reversed on this point. There are circumstances in the case which ought to have put Blydenburgh upon inquiry as to

Atwell's right to discharge the mortgage debt. The bond and mortgage were not in his possession at the time the certificate of discharge was given. The complainants in their bill offer to produce them, and the inference is that they were in the complainants' hands when the discharge was given. There is neither allegation nor proof that Blydenburgh made any inquiry of Atwell for the bond and mortgage, or that any misrepresentation were made by Atwell on that point. In the common and usual course of business Atwell, if he had been the owner of the bond and mortgage, would have delivered them to Blydenburgh when the satisfaction was acknowledged; and it is against all probability that Blydenburgh would have paid the debt either in money or by a conveyance of the land without inquiry for his bond. That inquiry would have resulted either in a discovery of the fact that the securities had been previously assigned by Atwell, or in a misrepresentation made by him of the true state of the case. Such a misrepresentation might have excused Blydenburgh. It would have been evidence of his good faith in taking the discharge. His answer, not being on oath, is not evidence in his favor, and the circumstances referred to raise a presumption against him which he was bound to remove by proof. This he has not done.

Sherwood was a purchaser *pendente lite*, and after notice of *lis pendens* filed. He is therefore to be regarded as a purchaser with notice of the complainant's claim.

GRIDLEY, J., was absent.

Judgment affirmed.

ASSIGNEE OF MORTGAGE BECOMES BY ASSIGNMENT MORTGAGEE, and the original mortgagor has no estate left in the land; and if he afterwards, by quitclaim, acquires the interest left in the mortgagor, he does not obtain thereby an estate which merges that of the assignee: *Pratt v. Bank of Bennington*, 33 Am. Dec. 201, note 202. The effect of a conveyance by a mortgagor to a mortgagee, after the latter has assigned the mortgage, is to put the legal title to the premises in the hands of the mortgagee, subject to the payment of the mortgage in the hands of the assignee: *Miller v. Lindsey*, 19 Hun, 208, citing the principal case. Where a mortgagee takes a conveyance from the mortgagor, a court of equity will not permit the mortgaged premises to be swept from him by a junior judgment creditor, without payment of the mortgage, under the pretense that its lien has been lost by merger: *McClaskey v. O'Brien*, 16 W. Va. 846.

ASSIGNMENT OF MORTGAGE DEBT CARRIES THE MORTGAGE SECURITY WITH IT: *Roberts v. Halstead*, 49 Am. Dec. 541, note 544, where other cases are collected: *Stewart v. Preston*, 44 Id. 621.

OMISSION OF VENDEE OF MORTGAGED PREMISES TO MAKE INQUIRY whether the mortgagee, his vendor, is still the owner and holder of the mortgage, de-

prives him of the protection of a *bona fide* purchaser: *Purdy v. Huntington*, 42 N. Y. 339, citing the principal case. Under some circumstances the omission of a mortgagor, when paying off his bond and mortgage, to require a delivery up to him of the securities may raise a presumption that the payment was not made in good faith: *Van Keuren v. Corkins*, 6 Thomp. & C. 357, citing the principal case.

WHATEVER IS SUFFICIENT TO PUT PARTY UPON INQUIRY is in equity held to be a good notice: *Kellogg v. Smith*, 26 N. Y. 24; *Baxter v. Gilbert*, 12 Abb. Pr. 101, both citing the principal case. See also *Price v. McDonald*, 54 Am. Dec. 657, note 667.

THE PRINCIPAL CASE IS DISTINGUISHED in *Foster v. Beals*, 21 N. Y. 252, and in *Van Keuren v. Corkins*, 66 Id. 81.

RUSSELL v. PISTOR.

[*7 NEW YORK (3 SELDEN)*, 171.]

CONVEYANCE OF PORTION OF MORTGAGED PREMISES, by the mortgagor, expressed to be upon condition that the grantee assumes and will pay the mortgage, renders the portion conveyed primarily liable for the entire mortgage debt.

CONDITION IN DEED, THAT PURCHASER ASSUMES PAYMENT OF EXISTING MORTGAGE on the land thereby conveyed is, if duly recorded, notice of the incumbrance, to any subsequent purchaser, whether he takes by direct grant or by foreclosure sale, or the like.

WHERE MORTGAGOR OF LAND SUCCESSIVELY CONVEYS Two PORTIONS of the mortgaged premises to different persons, with a stipulation in the first deed that the grantee will pay the mortgage, the second grantee will have an equitable right to have the mortgage first enforced against the portion first conveyed; of which right the mortgagor can not afterwards deprive him.

APPEAL from a judgment reversing a vice-chancellor's decree in foreclosure. The facts are given in the opinion. The supreme court held, in an opinion not reported, that the decision in *Harris v. Fly*, 7 Paige, 421, required a reversal of the decree of foreclosure which had been made.

Henry Hogeboom, for the appellant.

M. Schoonmaker, for the respondent.

By Court, **WELLES**, J. It is a general principle that where the owner of land mortgages it to secure the payment of a debt, and afterwards sells the equity of redemption subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase money, the latter becomes personally liable for the payment of the debt of the former to the holder of the mortgage in the first instance; and if the mortgagor is compelled to pay it, he can recover it from the

purchaser of the equity of redemption. In such case the mortgagor and purchaser stand in the relation of principal and surety, the latter as security for the former, to the extent of the mortgage debt: *Halsey v. Reed*, 9 Paige, 446; *Marsh v. Pike*, 10 Id. 595-597; *Cornell v. Prescott*, 2 Barb. 16; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Ferris v. Crawford*, 2 Denio, 595; and where the mortgagor sells and conveys the equity of redemption of a part of the premises mortgaged, subject to the mortgage, and the purchaser retains enough of the purchase money to satisfy the mortgage, and agrees to pay it, the same rule prevails, and the premises so sold are primarily chargeable with the payment of the mortgage: *Halsey v. Reed*, *supra*.

In the present case, after the execution and delivery of the mortgage to the trust company, Neely, the mortgagor, conveyed a portion of the premises to Burnett, by deed bearing date April 13, 1836, for the consideration of four thousand dollars, containing the following habendum clause: "To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever, subject, nevertheless, to a certain mortgage for seven hundred and fifty dollars on the said premises, held by the New York Life Insurance and Trust Company, which the said party of the second part agrees and undertakes to pay, he having retained so much of the purchase money agreed to be paid for the premises hereby conveyed, in his own hands for that purpose." After the execution and delivery of that deed, Burnett, according to the foregoing principles, became the principal debtor to the trust company, and the portion of the mortgaged premises purchased by him of Neely was thereafter primarily chargeable with the payment of that mortgage.

After these transactions, while Neely owned the mortgage taken by him from Burnett upon the portion of the premises sold him for the balance of the purchase money, and while Burnett owned the same premises, Neely conveyed two other portions or parcels of the premises mortgaged to the trust company, the title to which, by subsequent mesne conveyances, has become vested in the defendant Pistor. After Neely had conveyed these two other portions, it was not in his power to disturb the equities which existed in favor of the owners thereof. He conveyed all the rights which he possessed in relation to them; one of which was to have the trust company's mortgage satisfied out of the portion sold to Burnett so far as they would

go, and another was to hold Burnett the principal debtor *quoad* the mortgage debt to the trust company. Neely's grantees of other portions of the premises were not divested of those or any other rights by his subsequent assignment of the Burnett mortgage to the plaintiff containing the covenant that the premises covered by it were free and clear of incumbrances. It was *res inter alias acta*, and incapable of affecting equities which had previously attached in favor of parties unconnected with the transaction.

After the plaintiff, in 1841, had foreclosed the Burnett mortgage, and become the purchaser at the sale of the mortgaged premises, he succeeded to the rights of Burnett, was the owner of the premises embraced in that mortgage, and held them as Burnett had done, subject to the lien of the trust company's mortgage, with no other rights than Burnett had possessed, excepting the right to require Neely to remove the incumbrance of the trust company's mortgage; but with none whatever in reference to Pistor or his grantors—with respect to them the premises purchased by him remained chargeable with the payment of the whole of that incumbrance, and liable to be first sold to satisfy it. His purchase of it afterwards, and the assignment of it to him by the trust company, effected its entire extinguishment. He was left with only his personal claim upon Neely under the covenant in Neely's assignment of the Burnett mortgage. This is plain and common equity. He was the purchaser of that portion of the premises mortgaged to the trust company which had been devoted to its payment, and which if applied to that object would have been ample, as is apparent from the amount he bid for it at the mortgage sale. It was his duty to remove the incumbrance, and if Pistor had been compelled to pay it off in order to remove the cloud from his own title, equity would subrogate him to the rights of the trust company and allow him to proceed and sell the premises contained in the Burnett mortgage in the first instance for the purpose of satisfying it.

The judgment of the supreme court at general term should be affirmed with costs.

Judgment affirmed.

PURCHASER OF MORTGAGED PREMISES WITH NOTICE that the note secured by the mortgage was unpaid, and that the mortgage had been satisfied by the mortgagee without the knowledge of the holder of the note, takes subject to the mortgage: *Roberts v. Halstead*, 49 Am. Dec. 541, note 544. But subsequent purchasers of property subject to a mortgage on record in another

state are not affected by the lien thereof, unless they have actual or constructive notice of it: *McClenney v. McClenney*, Id. 738, note 742.

WHERE MORTGAGED PREMISES ARE CONVEYED SUBJECT TO MORTGAGE, the purchaser assuming the payment of the mortgage as a part of the purchase money, the land purchased is, in his hands, the primary fund for the payment of the mortgage: *Stebbins v. Hall*, 29 Barb. 536; *Lilly v. Palmer*, 51 Ill. 333; *Rubens v. Prindle*, 44 Barb. 345; *Remsen v. Beckman*, 25 N. Y. 581; *Northrop v. Hill*, 57 Id. 359; *Durham v. Craig*, 79 Ind. 122, all citing the principal case.

WHERE OWNER OF MORTGAGED PREMISES CONVEYS EQUITY OF REDEMPTION subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase money, the latter becomes liable to the holder of the mortgage for the payment of the debt of the former: *Hartley v. Harrison*, 24 N. Y. 171; *Bentley v. Vanderheyden*, 35 Id. 680; *Dingeldein v. Third Ave. R. R. Co.*, 37 Id. 577; *Garnsey v. Rogers*, 47 Ia 237; *Hartley v. Tatham*, 1 Robt. 260; *Rardin v. Walpole*, 38 Ind. 148, all citing the principal case.

SALE OF PART OF MORTGAGED PREMISES renders what remains first liable to be applied in satisfaction of the mortgage: *Engle v. Haines*, 43 Am. Dec. 624, note 625, where other cases are collected.

HE WHO ASSUMES PAYMENT OF DEBT SECURED BY MORTGAGE becomes the principal debtor, and he whose debt he assumes occupies the position of a surety: *Figart v. Halderman*, 75 Ind. 567, citing the principal case.

EVANS v. ROOT.

[7 NEW YORK (3 SELDEN), 186.]

FACTOR WHO ACCEPTS CONSIGNMENT ACCOMPANIED BY INSTRUCTIONS TO "SELL ON ARRIVAL," is bound to do so; and if he postpones selling, he will be liable for any loss sustained through a fall in prices.

DIRECTION "TO SELL ON ARRIVAL" IS EXPLICIT INSTRUCTION.

APPEAL from a judgment of nonsuit. The action was by a principal to recover damages from a factor for the latter's delay in selling a quantity of flour consigned, as the principal claimed, under instructions to "sell on arrival." On the trial the defendant contended that the instructions given were not as positive as was claimed by plaintiff; but the latter proved his letter accompanying the bill of lading, which was: "Inclosed I send you bill of lading for three hundred bls Niagara Mills flour, which please sell on arrival," and also a number of subsequent letters between the parties (the substance of which is given in the opinion), corroborating his version. Other testimony tended to show that though the flour might have been sold on arrival by forcing a sale, yet the factor had exercised an honest discretion in delaying to sell, in hope of better prices, though his

hope was not realized. The flour was ultimately sold at prices lower than those ruling when he received the consignment. The judge before whom the cause was tried directed a nonsuit, which the full bench sustained, on the ground that the instructions proved were not sufficiently distinct to throw upon the factor the duty of selling below the market price, which is a departure from ordinary duty and requires explicit instructions, and that the plaintiff had not shown that the defendant could have sold on arrival at market prices.

John L. Curtensius, for the appellant, the consignor.

John V. L. Pruyn, for the respondent, the factor.

By Court, Gridley, J. The plaintiff brought his action against the defendant in the supreme court to recover damages for a disobedience of instructions concerning the sale of two boat-loads of flour shipped to the defendant in the months of June and July, 1847. The instructions were "to sell on arrival," and it was for the loss occasioned by a failure to comply with this direction that the appellant brought his action. There is no doubt that these instructions were received and understood by the defendant. In answer to a letter of the plaintiff dated August 20, 1847, alleging that he had desired the defendant "to sell the flour on arrival," and complaining that the instructions had not been followed, the defendant writes, under date of the twenty-fifth of August, as follows: "Sir, yours of the twentieth is at hand. I represented your interest in the sale of six hundred and eight barrels of flour as well as I knew how. It would not sell on arrival. There was a panic in the market, and only little lots for home consumption would sell at all. I am prepared to prove this fact to your satisfaction. It is my plan to obey orders if I break owners, generally." If the defendant could not in fact sell the flour on its arrival, then he was not responsible for a disobedience of instructions; but we think the evidence shows, and especially that of the witness Barrett, that flour could be sold at any time in Albany at a reasonable deduction from the market price. There were sold daily through the season from five hundred to three thousand barrels at the usual market price in Albany. If the flour could have been sold even below the market price on its arrival, then all the authorities concur to show that it was the duty of the defendant to have sold it. It is laid down in Paley on Agency, edition of 1822, p. 4, that the primary obligation of an agent whose authority is limited by instructions is to

adhere faithfully to those instructions, for if he unnecessarily exceed his commission or risk his principal's effects without authority, he renders himself responsible for the consequence of his act. In *Rundle v. Moore*, 3 Johns. Cas. 36, it is said that "if the defendants have, as the agents or factors of the plaintiffs, through mistake or design, disobeyed their instructions, they are undoubtedly responsible." So in *Parkist v. Alexander*, 1 Johns. Ch. 394, it is laid down that "if an agent departs from the instructions of his principal he does it at his peril." In *Courcier v. Ritter*, 4 Wash. (U. S.) 549, it was held that it was the duty of an agent who was instructed to make sale of the article consigned for sale "immediately on arrival, to sell immediately on arrival, no matter at what loss." See also, to the same effect, *Bell v. Palmer*, 6 Cow. 128, where an agent under similar instructions was held liable for refusing the first offer, although under the market price. And this is a reasonable doctrine; for if a loss occur by reason of an implicit obedience to the instructions of the owner, such loss falls on him. Considering the lateness of the season and the probability of a rapid decline in prices, we can well see why the plaintiff would desire an immediate sale of the flour, and be willing to take the consequences of such deduction from the market price as might be necessary to effect a sale rather than incur the danger of delay.

The supreme court in refusing a new trial placed their decision upon the uncertain nature of the instructions. But it seems to us that a direction "to sell on arrival" is an explicit instruction, and the defendant seems to have so understood it in his letter of the twenty-fifth of August. It is substantially like the instruction in the cases in the sixth volume of Cowen and in Washington's circuit court reports. But if there were any doubt on this question, and the direction was open to two interpretations, it should have been submitted to the jury, under proper instructions, to say in what sense it was understood by the defendant. For these reasons, we are of the opinion that a new trial should be granted.

All the judges except WATSON, who dissented, concurring.

Judgment reversed, and a new trial ordered.

FACTOR, LIABILITY OF, FOR FAILING TO FOLLOW INSTRUCTIONS: See *Bloc v. Boiceau*, 51 Am. Dec. 345, note 351, where other cases are collected.

FAURE v. MARTIN.

[*N. Y. (3 Seldens), 210.*]

SALE OF LAND IN BULK IS NOT DEFEATED BY DEFICIENCY in quantity.
CONTRACT FOR SALE OF SPECIFIED FARM added to the designation of it the words "containing ninety-six acres, be the same more or less." The agreed price was sixty dollars per acre. The vendor gave a deed, stating the number of acres in the same way, which the purchaser accepted, he giving a mortgage for the price, computed for ninety-six acres at sixty dollars per acre. In an action (between the original parties) to foreclose this mortgage, the purchaser and mortgagor proved that the quantity was overstated in the deed and mortgage; that by survey the farm contained only eighty-six acres. *Held*, that the deficiency was no ground for reducing the sum recoverable on the mortgage.

APPEAL from a judgment for defendant in an action seeking equitable relief against a mortgage. The facts are stated in the opinion.

J. W. Elseffer, for the appellant, the mortgagor.

Henry Hogeboom, for the respondent, the mortgagee.

By Court, GARDNER, J. The only question presented in this cause is upon the construction of the agreement of the eleventh of September, 1846, made by the parties for the sale and purchase of the premises mentioned in the pleadings. The land is there described as "all that certain farm or lot of land now in her [the defendant's] possession, and whereon she resides, and wherof Jacob Martin died seised, containing ninety-six acres, be the same more or less." This is the whole description. The succeeding clause, "for the sum of sixty dollars per acre," etc., relates only to the consideration to be paid by the purchaser. In looking at this description without reference to extrinsic facts, it is obvious that the number of acres was not relied upon by the parties as indicating the absolute, but only the proximate and probable, quantity of the land. The phrase "be the same more or less" shows uncertainty as to the precise quantity, and that neither the vendor nor vendee intended that the sale should be defeated because the true number of acres exceeded or fell short of the number estimated: Rawle on Covenants for Title, 258, 259, and cases cited. The phrase is therefore sensible and pertinent in the connection in which it stands, and can not be rejected as surplusage.

What, then, was the land purchased by the plaintiff, as defined by this contract? The answer is furnished by the first part of the description above quoted. It was the premises in the pos-

session and upon which the defendant resided, and of which her husband, Jacob Martin, had died seized. There is nothing ambiguous in this description. For aught that appears, the possession of the defendant was open, definite, and notorious. There is no allegation in the pleadings, or pretense anywhere, that the parties did not understand what land was designated by the description. The deed subsequently executed, and which specified the limits of the property, was accepted by the vendee without any objection that it did not in this respect conform to the previous agreement and understanding of both parties. Indeed, the vendor and vendee have never differed as to the boundaries of the premises, but only as to the quantity of land embraced in them. The defendant, therefore, was bound to execute, and the plaintiff to accept, a conveyance of the land within the limits assigned by the agreement. If this is the fair construction of the contract, it substantially disposes of the question under consideration.

The vendee agreed "to pay the sum of sixty dollars per acre for the premises." This covenant must refer to the estimated number of acres previously mentioned, because this was the only data furnished by the contract for a computation of the consideration money. In the language of the contract, the vendee was "to pay the purchase money on receiving a deed." But what amount? The agreement implies that the obligations of the respective parties are there defined. The vendor, as we have seen, would discharge himself by a conveyance excluding all mention of quantity, but conforming in other respects to the description in the contract. The vendee was to pay or secure the whole purchase money. No previous act was to be done, no survey was to be made, and if the plaintiff had entered upon the premises with a view to ascertain the quantity by actual measurement, he would have subjected himself to an action of trespass. It is sufficient to say, however, that there is no covenant, express or implied, upon the vendor as to quantity, nor any stipulation that the number of acres should be ascertained by the joint or separate action of the parties, or either of them. It follows that the vendee must ascertain the amount of the consideration from the number of acres estimated in the agreement, and not otherwise. The parties have constantly acted upon this assumption. No survey was made nor any overtures to that effect by any one. The deed was accepted, the purchase money paid and secured upon this basis, and the deficiency which is now the subject of complaint was not, ac-

cording to the allegation of the plaintiff, ascertained until some-time subsequently. This view disposes of the case. It is not claimed that the original agreement was procured by fraud, misrepresentation, or mistake. The right of the parties was then established; and although the defendant, subsequently, and when the deed was executed, "falsely, fraudulently, and with knowledge of the fact, inserted in the deed a larger number of acres than was contained in said farm," it would not affect the plaintiff injuriously. The result of the matter would be that the parties in good faith entered into an agreement which the defendant subsequently fulfilled according to the letter and spirit. Fraud in any sense can not be affirmed of such a transaction, whatever might be the motive of the vendor in complying with her covenant. The evidence offered was therefore properly rejected as immaterial, and the judgment, for the reasons suggested, should be affirmed.

EDMONDS, J. On the eleventh of September, 1846, an agreement was entered into between these parties for the sale of a farm by the defendant to the plaintiff. On the first of April, 1847, the agreement was consummated by a deed which particularly described the premises, the description ending with the words "containing ninety-six acres, more or less." This is all that the deed contains as to the quantity, but the agreement says, "containing ninety-six acres, be the same more or less, for the sum of sixty dollars per acre." Upon the execution of the deed a mortgage was given for one thousand one hundred dollars of the purchase money, which was not paid when it became due, and the defendant proceeded to foreclose it under the statute. The plaintiff then alleged that the premises did not contain ninety-six acres, but only eighty-six acres, and brought this suit to obtain a deduction on the mortgage of sixty dollars the acre for the deficient ten acres.

There is no allegation in the complaint that there was any fraud as to the quantity, but simply that the defendant represented there were ninety-six acres, and the plaintiff believed that it was so, and bought accordingly.

On the trial there were several offers made to prove fraud on the part of the defendant, but the evidence was excluded, and the court ruled that under the pleadings no evidence could be received of fraud or mistake in respect to the quantity, that the sale was in bulk, and not by the acre, and that the plaintiff was not entitled to any allowance for a deficiency in the quantity.

It does not appear from the case what was the judgment rendered at the circuit, though from the foregoing statements of the ruling there, it may be inferred what it was. At the general term it was simply denying a motion for a new trial.

The consideration mentioned in the deed was five thousand seven hundred and sixty dollars, or equal to sixty dollars an acre for ninety-six acres.

The ruling as to the evidence of fraud was clearly right, because there was no allegation of fraud in the complaint, and it would have been improper to allow the plaintiff to have enlarged by evidence offered on the trial the cause of action as she had chosen to set it out in her pleadings.

And the whole question is, whether, even if there was a mistake as to the quantity, it can now be corrected.

I agree with the learned judge who presided at the circuit in the opinion that the sale was one in bulk, and not by the acre. There is no covenant or agreement anywhere that the premises do or shall contain any specific quantity. In both the agreement and the deed the quantity is stated indefinitely "ninety-six acres, more or less." And in both the farm is described as a whole, as having been bought of a particular person, as in the possession of the defendant, and as bounded by the lands of others, who are named. And whether the farm contained more or less than the quantity named, all of it passed, as it had thus been bought and occupied and bounded. Such, it appears to me, was clearly the intention of the parties as it is to be gathered from their written contract, and the purchaser was to take the risk whether the quantity fell short or run over. But even if it were otherwise, and even if both parties honestly made a mistake as to the quantity, it is not such an error as the courts can relieve against.

In actions at law, the suggestions of a mistake were never listened to as a defense in regard to a contract explicit in its terms. But in equity it was otherwise, and relief against mistakes was one ground of equitable jurisdiction. But even there the relief would not be granted unless the mistake was as palpable as if admitted, and was so great as to produce the conviction that the contract but for the mistake never would have been made, and being made, was entirely different from what was intended. And it was an essential ingredient to any relief under this head that it should be on an accident perfectly distinct from the sense of the instrument: *Per Lord Thurlow, Shelburne v. Inchiquin*, 1 Bro. C. C. 350; *Gillespie v. Moon*, 2 Johns. Ch. 596

[7 Am. Dec. 559]; see also 2 Kent's Com., 5th ed., 491, note c; Story's Eq. Jur., secs. 121-194.

These principles, which are well established, are directly in the way of affording to the plaintiff the relief she seeks. But we are not without authority as to their application to a case like the present. In *Marvin v. Bennett*, 26 Wend. 169, application was made for relief, on the ground of a mistake in the quantity. Gardiner, vice-chancellor, the chancellor, and the court for the correction of errors, all denied this relief, on the ground that where a lot or farm is sold in gross and conveyed by a deed containing the words "more or less," such words being inserted upon deliberation, because neither party professed to know the precise quantity contained within the boundaries of the deed, no court ought to interfere to make a new contract for the parties which they did not think proper to make for themselves. In *Leeder v. Fonda*, 3 Paige, 98, the chancellor, after alluding to the conflict in the American courts on this subject, says: "It seems now to be generally understood that where the contract has been consummated without fraud, misrepresentation, or concealment as to the real quantity, the courts will not inquire whether there has been a mutual mistake as to the supposed quantity contained within certain specified boundaries."

I think these cases were determined upon just principles, and therefore I am of opinion that the ruling in this case at the circuit was correct, and the judgment ought to be affirmed.

All the judges except GRIDLEY, J., who did not hear the argument, concurring.

Judgment affirmed.

CONSTRUCTION OF WORDS "MORE OR LESS" IN DEED: See *Frederic v. Youngblood*, 54 Am. Dec. 209, note 211, where other cases are collected. In an agreement for the sale of land for an entire sum, either a description of the land by its boundaries or the insertion of the words "more or less," or equivalent words, will control a statement as to the quantity of land, so that the party will not be entitled to relief, owing to there turning out to be a deficiency or a surplus, unless in cases where the difference is so great as to raise a presumption of fraud or gross mistake in the contract: *Noble v. Gouging*, 99 Mass. 235, citing the principal case. Where a contract for the purchase of land has been consummated, without any fraud as to the real quantity of land sold, courts will not inquire whether there has been an actual mistake as to the supposed quantity: *Van De Sande v. Hall*, 13 How. Pr. 459, citing the principal case. In *Wilson v. Randall*, 67 N. Y. 342, Andrews, J., referring to the principal case, said: "The construction given to the contract in *Faure v. Martin* is, at least, very strict in favor of the vendor, and we are not fully satisfied that it was the true interpretation of the agreement."

WHERE FARM IS SOLD FOR GROSS SUM without reference to the quantity, it is a sale in gross: *Thomas v. Beebe*, 25 N. Y. 248, citing the principal case.

DEFICIENCY IN QUANTITY OF LAND SOLD, WHEN GROUND FOR REVISION: See *Pringle v. Samuel*, 13 Am. Dec. 214, note 218, where other cases are collected.

VENDEE'S RIGHT TO RELIEF IN CASE OF DEFICIENCY IN QUANTITY OF LAND: See *Farmers' and Mechanics' Bank v. Galbraith*, 51 Am. Dec. 498, note 499, where other cases are collected.

THE PRINCIPAL CASE IS DISTINGUISHED in *Bellnap v. Sealey*, 2 Duer, 582, and in the same case on appeal, 14 N. Y. 152.

POLLOCK v. NATIONAL BANK.

[7 NEW YORK (3 NELDEN), 274.]

CORPORATION WHOSE OFFICERS, ALTHOUGH INNOCENTLY DECEIVED BY FORGED POWER OF ATTORNEY, permit shares of stock to be transferred on the books without authority from the shareholder may be compelled to replace them or pay him the value of them.

BILL IN EQUITY WILL BE TREATED BY THE COURT AS ORIGINAL or as a cross-bill, according to its substance and the relief prayed; not according to the title which may have been given to it by the solicitor.

APPEAL from a judgment dismissing a bill in equity. The facts appear in the opinion.

Charles O'Conor, for the appellants.

Edward Sandford, for the respondent.

By Court, GARDINER, J. The Misses Pollock were the acknowledged owners of fifty shares of stock of the National Bank, standing in their names on the books of that institution, with the certificates, the evidence of their title, in their possession. This stock was subsequently transferred from their names to the names of other persons by the permission of the bank, which received and canceled the original certificates, and has ever since refused to pay dividends to the complainants, or in any way to recognize them as stockholders in the institution, and denied their title to or any interest in the capital stock of the bank. All this has been done without any authority or assent, express or implied, upon the part of the true owners; and the question is, Are they entitled to any relief? It is said that inasmuch as the transfer was made by virtue of a forged power of attorney the stock is still the property of the complainants. But a title to stock in the abstract, without any legal evidence of such title, without the power of sale or of obtaining dividends, is not the ownership which the complainants once pos-

sessed, and of which they have been deprived by the agents of the bank. They held certificates; these the bank have canceled, and instead of issuing new ones to the complainants it denies their right altogether. It was said that there was no proof that the power of attorney was forged. But the answer is that the original title of the Misses Pollock is admitted, and if the bank sets up a title derived from them in bar of their claim it must be proved. The affirmative of the issue is with the respondent.

The technical objection as to the form of the remedy is not well founded. This is not a cross-bill in any sense. The complainants seek affirmative relief, which the bank refuses upon the ground that the complainants have no claim to any stock, but have duly parted with all their title. I think the bank is bound to issue new certificates and account for the dividends, or if upon inquiry it should be ascertained that it has no stock which it can transfer to the names of the complainants, then it should pay to them the value of the shares owned by them according to the prayer of the bill. The decree of the supreme court should be reversed and a decree made in accordance with the prayer of the complainants' bill.

RUGGLES, C. J., and JEWETT, JOHNSON, and WATSON, JJ., concurred.

GRIDLEY and EDMONDS, JJ., were absent.

WELLES, J., delivered a dissenting opinion.

Decree reversing the decree of the supreme court, and granting the prayer of the bill.

BANK WHICH HAS PERMITTED TRANSFER OF STOCK owned by a stockholder, upon a forged power of attorney, and has canceled the original certificates, may be compelled to issue new certificates; and if it has no shares which it can issue, it may be compelled to pay their value: *Cushman v. Thayer Mfg. J. Co.*, 76 N. Y. 369, citing the principal case. Persons who have received from the transfer agents of a corporation spurious certificates of stock, without any knowledge or suspicion of fraud or irregularity, and have advanced money thereon, are entitled to recover damages against the company, in a proper action: *New York & N. H. R. R. Co. v. Schuyler*, 38 Barb. 555; *Comstock v. Buchanan*, 57 Id. 147, note; *Mechanics' Bank v. New York & N. H. R. R. Co.*, 4 Duer, 541; *New York & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 85, 87; *Salisbury Mills v. Townsend*, 109 Mass. 121, all citing the principal case.

OWNER OF STOCK IN CORPORATION MAY MAINTAIN ACTION against it to compel it to transfer the stock upon its books: *Cushman v. Thayer Mfg. J. Co.*, 7 Daly, 332; S. C., 53 How. Pr. 62; *Purchase v. New York Exchange Bank*, 3 Robt. 170; *Stewart v. Firemen's Ins. Co.*, 53 Md. 579, all citing the principal case. The principal case is also referred to in *People v. Parker Vein*

Coal Co., 1 Abb. Pr. 129; S. C., 10 How. Pr. 551, as a case showing that a remedy by action to compel a moneyed corporation to make transfers of stock is effectual and readily obtained.

TITLE TO STOCK ACQUIRED BY FRAUD, and without the consent or authority of the owner, can not avail against him: *Weezer v. Barden*, 49 N. Y. 289, citing the principal case.

BILL ASSUMING TO BE CROSS-BILL, but which really brings into the case new matters not connected with the subject-matter of the original suit, is to be regarded as an original bill, and calling it a cross-bill is simply applying to it a misnomer: *Farmers' and Mechanics' Bank v. Bronson*, 14 Mich. 372, citing the principal case.

WINTER v. COIT.

(*7 NEW YORK (3 SLEDEN)*, 288.)

FACTOR WHO DOES NOT ACCEPT TERMS ON WHICH CONSIGNMENT TO HIM IS MADE can not resist such other disposal of the goods as the consignor may make.

FACTOR'S LIEN FOR GENERAL BALANCE DOES NOT ATTACH (unless by some agreement of the parties) until the goods come to his possession.

APPEAL from a judgment affirming a judgment of the New York superior court in favor of plaintiff in replevin. The goods claimed were bales of cotton which one Hunter, of Columbus, Georgia, had consigned to the defendants, who were commission merchants in New York city, under a general arrangement between him and them that he should consign cotton to them for sale and might draw upon them for advances. Eight or ten letters which passed between the parties, and were put in evidence on the trial, showed that Hunter accompanied his consignment of this parcel with a letter requesting defendants to insure it, also apprising them that he had drawn on them for three thousand five hundred dollars. This draft they refused to accept, because larger than they considered him entitled to draw, and it was returned to Hunter protested.. He then drew for two thousand four hundred dollars, which draft the plaintiff cashed; and to secure the plaintiff in doing so, Hunter gave him a mortgage or assignment of the cotton, then on its way to the defendants. The condition of this security was that defendants should accept and pay the draft on them for two thousand four hundred dollars, which plaintiff had cashed for Hunter. The draft was presented before defendants received the goods, but they refused to honor it. They also refused, after the cotton was received, to deliver it to plaintiff's agent; claiming to hold it for their general balance, or if not for that,

at least for their commissions and expenses on this single consignment. The plaintiff then replevied the goods. In the superior court the plaintiff had a verdict and judgment, which the supreme court affirmed. The defendants appealed.

William Curtis Noyes, for the appellants, the commission merchants.

Daniel Lord, for the respondent, the mortgagee of the goods.

By Court, JOHNSON, J. The jury were properly instructed as to the waiver of the defendants' lien for their charges for insurance, freight, cartage, labor, storage, and fire insurance, that if on being apprised of the plaintiff's claim they put themselves not upon their lien, but only upon the denial of the plaintiff's right, they could now assume a different ground: *Holbrook v. Wight*, 24 Wend. 169 [35 Am. Dec. 607].

The jury were likewise instructed that if the cotton in question was consigned to defendants as Hunter's factors, with advice of a draft and directions to insure, and not with intent of transferring to them the property in the cotton, or on any agreement to consign the same to them in payment of or security for any previous debt owing by Hunter to the defendants, then that the cotton remained subject to Hunter's disposal until it should come to the actual possession of the defendants, unless they should have actually accepted the consignment according to the terms of Hunter's letter of consignment.

Patten v. Thompson, 5 Mau. & Sel. 350, shows that though the factor is under acceptance on general account for a consignor, and has the bill of lading, yet that until the actual receipt of the property, the vendor to the consignor may stop them *in transitu*. It was so held upon the ground that there was neither a pledge by way of security for advances made, nor an assignment of the bill of lading except for the purpose of enabling the factor to receive the property and carry it to the account of his principal, and without any reference to a loan or balance due the factor. Lord Ellenborough refers to *Kinloch v. Craig*, 8 T. R. 119, as going upon the same ground, although in that case the bill of lading was unindorsed, and as to that circumstance he says: "With respect to the indorsement of the bill of lading, if it be made to the party merely as factor, I conceive it carries his rights no further, being made for the benefit of the principal." The same doctrine is recognized in *Grevener v. Phillips*, 2 Hill (N. Y.), 147. None of the cases

hold or at all countenance the doctrine that a factor or consignee can acquire a lien for his general balance before he gets possession of the property, unless it be in pursuance of the agreement of the parties, express or implied from their acts and course of dealing. In this case the question whether such an agreement existed, depending upon both the letters and the course of business of the parties as they appeared in evidence, was submitted to the jury, who have found that no such agreement existed. The judgment should therefore be affirmed.

Judgment affirmed.

FACTOR'S LIEN: See *Martin v. Pope*, 41 Am. Dec. 66, note 72; *Knapp v. Alورد*, 40 Id. 241, note 244, where other cases are collected. Factors acquire no lien for general balance until the property is actually received by them, unless it is in pursuance of an express agreement, or one necessarily implied from their dealings with their principals: *Beebe v. Mead*, 33 N. Y. 592, citing the principal case.

BAILEE OF GOODS WAIVES HIS LIEN by placing his refusal to deliver them on other grounds: *Long Island Brewery Co. v. Fitzpatrick*, 18 Hun, 292; *Tiffany v. St. John*, 65 N. Y. 318, citing the principal case.

L'AMOREUX v. GOULD.

[? NEW YORK (3 SKLDEN), 349.]

CONTRACT THAT IF PROMISEE WILL PAY NOTE ON WHICH HE IS INDORSER the promisor will pay him a specified sum, followed by payment of the note by the promisee, is a valid contract, and will support an action for the sum promised.

APPEAL from a judgment entered upon the report of a referee. The facts were that L'Amoreux, the plaintiff, was indorser upon five notes made by John Woodworth, some of which were due and had been put in suit, while others had not yet matured. Woodworth being unable to meet them confessed judgment to Gould in trust to secure L'Amoreux. Gould then gave to L'Amoreux a written promise, reciting the foregoing facts, and saying: "Now, in consideration of the premises, and in consideration that the said James L'Amoreux shall advance and pay the sum of one thousand dollars towards satisfying or in part satisfying the notes on which he is holden as indorser as aforesaid, and shall exhibit to the said Charles D. Gould the evidence of such payment, the said Charles hereby agrees with the said James that within one year from this date he will cause to be raised under the said judgment given as aforesaid the said sum

of one thousand dollars, with interest, and will pay the same over to the said James in satisfaction of the money so to be advanced toward satisfying said indorsements." L'Amoreux afterwards paid the notes; and on Gould's refusing to pay the one thousand dollars, brought this action of *assumpsit* to recover it. The defense was, that the contract was void for want of mutuality and of consideration. The judgment was in favor of plaintiff.

John C. Spencer, for the appellant.

Nicholas Hill, jun., for the respondent.

By Court, Edmonds, J. (after disposing of some objections arising upon the pleadings which were cured by the finding by the referee). The only question to be determined, therefore, is, whether there was such a want of mutuality between the parties that there was in fact no cause of action.

The proposition is stated by Chitty as broadly as the defendant's counsel claims it, that if the one party never was bound on his part to do the fact which forms the consideration for the promise of the other, the agreement is void for want of mutuality: Chit. Con. 15; but the proposition is too broadly stated. It is confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise: *Arnold v. Mayor of Poole*, 4 Man. & G. 860. For there are many valid contracts not mutually binding at the time when made; as where A. says to B., If you will furnish goods to C. I will pay for them, B. is not bound to furnish them, but if he does he may recover on the promise: *Barber v. Fox*, 2 Saund. 137 h; *Morton v. Burn*, 7 Ad. & El. 19; *Kennaway v. Treleavan*, 5 Mee. & W. 498. And the question in this case is not whether the plaintiff is bound to pay the one thousand dollars, but whether, if he did pay it, the defendant was without any valid or available consideration for his promise. The agreement is, that if the plaintiff will pay one thousand dollars on notes on which he is holden as indorser, etc. Now, I am not very clear whether this means on notes on which he was absolutely fixed and liable as indorser by means of due protest, or those on which he was merely liable to be in case of non-payment by the drawer. The pleadings do not help us out of the difficulty at all, but the evidence shows that three of the five notes were not due at the time the agreement was made, and the agreement recites that he was indorser on several notes, some of which had become due, etc. Those notes which

had become due at that time, and on which alone the plaintiff could then have become "holden" by due protest, did not amount to one half of the one thousand dollars that he was to pay, while all of the five notes which he had indorsed amounted to more than the one thousand dollars. I should infer that the parties meant by this equivocal expression to refer to the fact of his indorsement only, and not to the fact of his being fixed as indorser. This is a material consideration, because if the plaintiff was to pay the one thousand dollars merely upon notes upon which he was finally fixed and "holden" by due protest, he would do nothing more by paying that sum than merely discharge an obligation which he was bound to perform, and that would form no consideration for the defendant's promise.

But if, on the other hand, he voluntarily paid the money, without reference to his being fixed as indorser, and in fact waived the various acts of demand and protest which were necessary to fix him as indorser, he thus assumed a liability and performed an act detrimental to himself, which would furnish a good consideration for the promise. And inferring, as I do, from the facts proved on the trial and from the language of the agreement that the parties meant all the notes, as well those not due as those due and protested, I have no difficulty in finding a sufficient consideration to support the promise, in the fact of the plaintiff's having paid the one thousand dollars and thus enlarged his liability beyond what it was when the agreement was made.

This disposes of the only point not cured by the finding, and I am of opinion the judgment ought to be affirmed.

All the judges concurred in the opinion.

Judgment affirmed.

GRATUITOUS PROMISES OR PROPOSITIONS TO PAY MONEY upon a condition, or upon the happening of some event, or the doing of some act, or incurring of some expense, loss, or legal obligation, become binding as legal and valid contracts upon the acceptance and performance of the stipulated condition: *Wayne & O. C. I. v. Smith*, 36 Barb. 584; *Hammond v. Shepard*, 29 How. Pr. 190; S. C., 40 Id. 454; *Loughran v. Smith*, 11 Hun, 314, all citing the principal case. An agreement by an indorser to take up notes before they are due, and before he is charged as indorser, is sufficient consideration to support a promise to pay the money so advanced: *Sanders v. Gillespie*, 64 Barb. 635; affirmed on appeal, 59 N. Y. 252, both citing the principal case. Though there be not mutual promises, yet if, before he calls for the fulfillment of the promise, the promisee does perform that in consideration of his doing which the promise was made, there is a consideration for the agreement, and it can be enforced: *Willets v. Sun Mut. Ins. Co.*, 45 N. Y.

48; *White v. Baxter*, 41 N. Y. Superior Ct. 368; *Andrews v. Campbell*, 36 Ohio St. 368, all citing the principal case.

LOSS TO PROMISSE OR BENEFIT TO PROMISOR IS SUFFICIENT CONSIDERATION: See *Davis v. Steiner*, 53 Am. Dec. 547, note 550; *Brown v. Ray*, 51 Id. 379, note 380, where other cases are collected.

WHITE v. MERRITT.

[*7 NEW YORK (3 SELDEN)*, 332.]

JUDGMENT CAN NOT BE IMPEACHED COLLATERALLY, in a subsequent action for damages, by proof that the plaintiff in it, while suit was pending, practiced deceit upon defendant, whereby the latter was led to forbear interposing a defense fraudulently concealed from him.

DECEIT PRACTICED BY DEFENDANT, CAUSING DAMAGE TO PLAINTIFF, may sustain an action without proof of benefit to the defendant.

AGENT DECEITFULLY TOLD PRINCIPAL THAT HE HAD NOT TAKEN NOTE from a debtor to the principal; but in the principal's action for the debt the debtor successfully defended by proof that the agent had accepted his note. *Held*, that the agent was liable to the principal for deceit.

APPEAL from a judgment sustaining a demurrer to a declaration in *assumpsit*. The leading facts shown by the declaration were that the plaintiff, who had sold cattle to one Sammis, employed defendants to collect the bill; and they made an advance to plaintiff on the face of the bill. They accepted Sammis' note for the debt, but he failed before it matured. Defendants then sued plaintiff for their advance, denying to him that they had given time to Sammis. Relying on this explicit denial, he made no defense to the action for the advance, and also brought an action against Sammis for his original debt, the expense of which action was greatly increased and the result rendered fruitless by Sammis' defending on the ground that his note had been accepted. The plaintiff had paid the judgment for the advance. The courts below held these facts insufficient to support an action.

Hiram P. Hastings, for the appellant.

Edward Sandford, for the respondents.

By Court, WELLES, J. According to the plaintiff's showing, he had a good legal defense to the suit brought against him by the defendants for their advance to him on the claim against Sammis, of which he neglected to avail himself. The suit was prosecuted to judgment, and the defendants recovered the amount of their advance with interest and the one per cent

which by the contract they were to receive as commissions. By the judgment it is established that it was legal and proper that the plaintiff should pay the defendants the amount of their advance, with the interest and commissions, which is utterly inconsistent with the plaintiff's claim to recover it back. No averment is to be admitted to contradict a judgment or to dispute any legitimate inference deducible therefrom. The maxim is, *Interest reipublicæ ut sit finis litium.* To sustain this action to recover back the advance would be to open the judgment and inquire into its propriety and legality. That can not be done collaterally. If it was right under the contract between the parties that the plaintiff should pay back to the defendants the money recovered by the judgment in their favor, it was because they had performed all the stipulations of the agreement on their part, and had failed to collect the amount of the claim against Sammis. That is one of the things established by the judgment, and the plaintiff is not now to be allowed to deny it. The plaintiff seeks to avoid these consequences of the judgment by alleging fraudulent concealments and misrepresentations of facts by the defendants which induced him to omit defending the suit and to let judgment pass against him by default. That, however, is not a legal answer to the difficulty. It probably would entitle him to recover, provided the payment had been voluntary and induced by fraudulent concealment and misrepresentation. But no case has gone the length of deciding that after the proceeding has advanced to the maturity of a judgment, and the judgment collected by execution, it may be recovered back.

It is true the action is case for the unfaithfulness and fraudulent conduct of the defendants as the plaintiff's agent, and not *assumpsit* for money had and received. But it is not perceived how the form of the action can change the legal principle. If the plaintiff had not been called upon for the money by action or otherwise, and had not paid it, clearly he would have no ground of complaint against the defendants for doing what the declaration alleges they have done, and it is impossible to see how he could properly be called upon to pay if the defendants are liable upon the case made by the declaration. If the facts as alleged in the declaration are all true, the case is undoubtedly a hard one for the plaintiff, but that is no reason why a well-settled rule of law should be violated. The demurrer admits none of the facts alleged but such as are well pleaded; and if nothing can be alleged to impeach a regular

judgment, as is undeniable, all the allegations of the declaration tending to that result must be rejected. See the case of *Marriott v. Hampton*, 2 Smith's Lead. Cas. 237, and the notes to that case; also, S. C., 7 T. R. 269.

After abstracting from the case all which the judgment disposes of, there is still in substance the following, to wit: that after the plaintiff had paid the judgment he called on the defendants and inquired of them whether there was any legal impediment to his prosecuting Sammis for the price of the cattle sold, and whether any note had been taken from him for the same, and that the defendants thereupon falsely, and with intent to injure the plaintiff, represented to him that no note had been taken, etc., whereby the plaintiff was subjected to a much larger bill of costs and other expenses in the prosecution which he afterwards instituted than he would otherwise have had to pay.

Fraud and deceit in the defendant and damages to the plaintiff are a sufficient foundation for the action of trespass on the case, though no benefit accrue to the defendant. The action will lie whenever there has been the assertion of a falsehood with a fraudulent design as to a fact, when a direct and positive injury arises from such assertion: 1 Bac. Abr., Action on the Case, F, ed. of 1842, p. 125; *Benton v. Pratt*, 2 Wend. 385.

Here was the assertion by the defendants of a falsehood with a fraudulent intent to injure and deceive the plaintiff, by which he was induced to bring the action against Sammis on the account as for goods sold generally, and which induced the defendant Sammis to interpose a defense, thereby increasing the cost and expense of obtaining the judgment from twelve dollars to two hundred dollars. The law would be exceedingly lame, and be quite undeserving of the high encomiums which have been bestowed upon it, if it failed to afford a remedy for a malicious injury of this description.

For these reasons the judgment of the court below should be reversed, and judgment should be given for the plaintiff on the demurrer in that court.

Judgment reversed.

CONCLUSIVENESS OF JUDGMENT: See *Lynch v. Baxter*, 51 Am. Dec. 735; *Smith v. Tupper*, 43 Id. 483, note 487, where other cases are collected. Even if a defendant is ignorant of a defense, and the plaintiff knows of its existence, but fraudulently conceals it from him, he can not sustain another action against him to "rip up" anything adjudged in the former suit: *Black v. Woods*, 13 Barb. 321; *Salisbury v. Creweell*, 14 Hun, 464, both citing the principal

case. No averment is to be admitted to contradict a judgment, or to dispute any legitimate inference deducible therefrom: *Gates v. Preston*, 41 N. Y. 115, citing the principal case. Evidence *alibi* the judgment roll is admissible to show what was litigated and passed upon in a former action: *Lawrence v. Cabot*, 41 N. Y. Superior Ct. 134, citing the principal case. Judgments may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. But they can not be impeached for any facts which were necessarily before the court and passed upon: *The Acorn*, 2 Abb. 445, citing the principal case. The principal case is referred to in *Lowenstein v. McIntosh*, 37 Barb. 256, as a case showing what facts a judgment establishes.

AFTER JUDGMENT HAS BEEN DULY OBTAINED AND COLLECTED ON EXECUTION the money can not be recovered back in another action: *Farrington v. Bullard*, 40 Barb. 518, citing the principal case.

FALSE REPRESENTATIONS, LIABILITY FOR: See *Mitchell v. Zimmerman*, 51 Am. Dec. 717, note 722; *Munroe v. Pritchett*, 50 Id. 203, note 208; *Tyson v. Passmore*, 44 Id. 181, note 185, where numerous other cases are collected. An action for false representations will lie where there has been an assertion of a falsehood with a fraudulent design as to a party, and a direct and positive injury: *Wakeman v. Dalley*, 44 Barb. 502; S. C. on appeal, 51 N. Y. 33, both citing the principal case. A false statement made by an individual in reference to articles manufactured by others, for the purpose of preventing sales by them of such articles, and which do in fact prevent such sales, and injure the manufacturers in their business, constitute a good cause of action: *Snow v. Judson*, 38 Barb. 212, citing the principal case. A false representation made with intention to injure one, and in relying upon which he is injured, is a good cause of action, although no benefit accrues to the party making it: *Rick v. Massey*, 68 N. Y. 86, citing the principal case.

FOSTER v. PETTIBONE.

[7 NEW YORK (3 SELDEN), 433.]

CONTRACT BY WHICH MERCHANT AGREES TO DELIVER TO MILLER WHEAT TO BE GROUNDED, and the miller agrees to return a specified proportion of flour for each wheat, is a bailment, not a sale, and the wheat, and also the flour when ground, are the property of the merchant.

IN CONSTRUING CONTRACT, INTERPRETATION MUST BE UPON ENTIRE INSTRUMENT, and not merely on disjointed or particular parts of it.

An **APPEAL** from a judgment founded on the report of a referee. The question was as to the legal title to a quantity of flour. Brown, a merchant, had made the following contract with Foster, a miller: "John G. Brown agrees to deliver to William C. Foster, at Rochester, thirty thousand bushels of wheat to be ground; fifteen thousand bushels to be ground in season to be shipped east during navigation this fall, and fifteen thousand to be ground during the winter; said Brown is to be subject to no charge on account of storage; said Foster is to deliver to said Brown one barrel of superfine flour for each five bushels of

wheat so delivered to be ground. The wheat to be received from Gelston & Evans, and the flour to be delivered to them." Under this contract Brown furnished wheat to Foster, and Foster ground it and shipped the flour by canal, all according to agreement. But the voyage being interrupted, the carrier stored the flour; whereupon the question arose whether Foster or Brown had the right to demand it from the warehouseman. Brown, claiming that the contract was one of bailment, replevied the flour; and Foster, claiming that there had been a sale, sued the sheriff, as a trespasser, for having taken it. The referee reported in favor of plaintiff, and the general term affirmed the judgment on this report, saying, in an opinion not reported, that as the contract was expressed Foster could have discharged his obligation to Brown by delivering one barrel of superfine flour for every five bushels of wheat he received, whether the flour delivered was ground from the particular wheat supplied by Brown or not; therefore the contract was a sale, vesting the legal title in Foster. From their judgment the defendant appealed.

Nicholas Hill, jun., for the appellant.

George F. Comstock, for the respondent.

By Court, RUGGLES, C. J. This controversy arises upon a contract in relation to wheat between a merchant and miller; and it is one of the many cases concerning the same subject-matter in which it is somewhat difficult to determine whether the parties intended to make a contract of sale or of bailment.

The distinction between a bailment and a sale is correctly laid down by Bronson, C. J., in *Mallory v. Willis*, 4 N. Y. 85, in these words: "When the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed: it is a sale."

The judges in that case differed with respect to the effect of the distinction upon the case before them, but not in regard to the distinction itself.

We will examine the contract in detail. In October, 1844, Brown agreed to deliver to Foster at Rochester thirty thousand bushels of wheat to be ground. These words, unless qualified and controlled by some subsequent grant of the agreement,

show a bailment for manufacture, and not a sale. They show what was to be done with the wheat. If the contract operated as a sale, Foster might lawfully sell it again and immediately. But it was to be ground, and not sold; and the words used by the parties control the power of Foster over the wheat, and prevent him from selling it as his own property.

The contract proceeds: "Fifteen thousand bushels to be ground in season to be shipped east during the navigation this fall." What was to be shipped east? The only answer to be given to this question, consistent with the language of the parties is, that it was the flour to be made of this fifteen thousand bushels of wheat. And if this part of the contract is obligatory on Foster, he was bound to return that identical flour for the purpose specified.

Why was the time fixed within which it was to be manufactured? If the transaction was a sale, the time was immaterial, because Foster might have delivered other flour without having ground the wheat within the time; but if it was a bailment, the time was material, and the parties deemed it material or they would not have fixed it by stipulation in the contract. They contemplated a bailment, therefore, and not a sale.

The contract goes on thus: "And fifteen thousand to be ground during the winter." The same observations apply to this clause. Both these provisions are obligatory upon Foster; they bind him to grind the wheat within the specified times; and this was to be done for the benefit of Brown. But Brown could derive no benefit from the manufacture within the time, except to enable Foster to return him the flour to be made from the wheat, and if that was what the parties meant should be done, they intended a bailment, and not a sale.

The next provision in the contract is this: "Said Brown to be subject to no charge on account of storage." If the parties had intended a sale, this clause was useless and senseless; because Foster could have no pretense for charging for the storage of his own wheat. But if they intended a bailment, this provision was useful, effective, and sensible. It secured Brown against a charge which Foster would otherwise have had a right to make. It is a legal maxim that any part of an instrument shall if possible be construed as having some effect. If we apply this maxim to the contract in question, we must regard the transaction as a bailment, and not a sale.

There was this further provision in the contract: "The wheat to be received from Gelston & Evans, and the flour to be re-

turned to them." The import of this sentence is that the wheat received from Gelston & Evans should go back to them again in flour. The delivery to them of the flour of the same wheat would be a return of the same thing in a different form. The delivery of the flour of other wheat would not be a return to Gelston & Evans, because it had never been in any form in their hands.

Every sentence in the contract has now been noticed excepting one, and every sentence thus noticed contains evidence that the parties intended a bailment, and not a sale.

The part not yet noticed stands in the contract immediately after the clause in relation to storage; it is in these words: "Said Foster is to deliver to said Brown one barrel of superfine flour for each five bushels of wheat so delivered to be ground."

It is contended that Foster is not bound by this stipulation to return Brown or his agents the flour of the same wheat, but may perform his contract by the delivery of any other superfine flour, and therefore the transaction was a sale, and not a bailment.

If the particular clause under consideration were to be considered and construed by itself and without reference to any other part of the contract, we should assent to the plaintiff's proposition; and according to the rule by which a sale is distinguished from a bailment we should regard it as a sale, because Foster is not expressly and in terms bound in this clause to return flour of the same wheat. There are, however, even in this clause, words which make it doubtful whether the parties did not look to a return of that flour. The purpose for which the wheat was delivered, namely, "to be ground," is distinctly expressed in it; and if we are to understand it was to be ground for Brown (and that seems to be a natural and necessary interpretation), the parties must have regarded it as Brown's flour in Foster's hands as bailee. But it is a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in collecting the intention of the parties; although the immediate object of inquiry be the meaning of an isolated clause: Chit. Cont. 83, and authorities cited. Here is a contract, every sentence of which excepting one shows an intention to create a bailment, and not to make a sale. Even that one standing alone is ambiguous. It shows expressly that the wheat was delivered to be ground, and by implication that it was to be ground for Brown. It au-

thorizes performance by a return of the flour made from the wheat received. It is not directly repugnant to the other parts of the contract, because it does not require performance by the delivery of flour made from other wheat. It must, therefore, be construed in subserviency to the intention to create a bailment which is so plainly manifested in all the other parts of the instrument, and the flour which Foster was bound to return was (although not expressly specified in the particular clause in question) the flour to be manufactured from the wheat received under the contract.

The judgment of the supreme court should be reversed and a new trial ordered.

GARDINER, JEWETT, JOHNSON, WATSON, and WELLES, JJ., concurred.

MORSE, J., dissented.

Judgment reversed, and a new trial ordered.

DELIVERY OF WHEAT TO MILLER TO BE PAID FOR IN FLOUR constitutes a bailment, and not a sale, when: See *Inglebright v. Hammond*, 53 Am. Dec. 430, note 435; *Smith v. Clark*, 34 Id. 213, note 215, where other cases are collected. The test of a bailment is, that the identical thing delivered is to be returned. If the obligation of the receiver be to return another thing of equal value, it is a sale: *Marsh v. Titus*, 6 Thomp. & C. 31, citing the principal case. An agreement to let a person have ten sheep of a certain grade and quality of wool, to double in four years, is a sale of the ten sheep, and not a bailment of them: *Bartlett v. Wheeler*, 44 Barb. 163, citing the principal case. Where owners of calicoes give them to printers to have them printed and then returned to them, the goods remain the property of the original owners: *Wood v. Orser*, 25 N. Y. 350, citing the principal case.

CONSTRUCTION OF CONTRACT DEPENDS UPON THE INTENTION of the parties as gathered from the whole instrument: See *Chapman v. Glassell*, 48 Am. Dec. 41, note 47, where other cases are collected.

LITCHFIELD v. WHITE.

[7 NEW YORK (3 SKLDEN), 438.]

ASSIGNMENT FOR BENEFIT OF CREDITORS CAN NOT EXEMPT the assignee from the obligation to use ordinary care; a provision that he shall be liable only for his own gross negligence or willful misfeasance renders the instrument void.

APPEAL from a judgment in favor of plaintiffs in a creditor's suit brought to impeach a general assignment. The objection to the assignment was that it contained the following provision: "And it is hereby mutually agreed, by and between the parties

hereto, that the said party of the second part shall not be liable or accountable for any loss that may be sustained by said trust property, or the proceeds thereof, unless the same shall happen by reason of his own gross negligence or willful misfeasance." The superior court held that this condition rendered the instrument null and void as against non-consenting creditors. From their judgment setting it aside the defendants, who were the assignor and assignee, appealed.

Daniel Lord, for the appellants.

Charles Tracy, for the respondents.

By Court, RUGGLES, C. J. The assignment in question contained a clause by which it was mutually agreed between the parties thereto that the assignee should not be liable or accountable for any loss that might be sustained by the trust property or the proceeds thereof, unless the same should happen by reason of the gross negligence or willful misfeasance of the assignee.

It is difficult to conceive what motive led to the insertion of this provision in the assignment, unless it had, or was supposed to have, the effect of qualifying the responsibility of the assignee and of exempting him from accountability in cases where he might otherwise have been accountable. Nevertheless, if the clause be a mere nullity, it ought not to vitiate the assignment. The question therefore is whether a trustee for the benefit of the creditors of a failing debtor is responsible for any neglect or mismanagement of the trust not amounting to "gross negligence or willful misfeasance."

Every man who is intrusted with the property of another is bound to exercise in relation to its custody, management, and disposition a certain degree of diligence, according to the nature and circumstances of the case. According to the elementary books, there are three degrees of diligence, for the exercise of which every bailee or trustee is responsible in the discharge of his duty to the real owner or beneficiary of the property. These three degrees are denominated high or great diligence, common or ordinary diligence, and slight diligence. High or great diligence is that with which prudent persons take care of their own concerns. Common or ordinary diligence is that which men in general exert with respect to their own concerns; and slight diligence is that with which persons of less than common prudence, or indeed of any prudence at all, take care of their own concerns: Story on Bail., secs. 11-16.

Negligence is also divided into three corresponding degrees: gross negligence is the want of slight diligence; ordinary negligence is the want of ordinary diligence; and slight negligence is the want of high or great diligence: Story on Bail., sec. 17. These distinctions are sufficiently obvious to the mind in theory; but it must be admitted that their practical application to particular cases is sometimes difficult. They appear, however, to be well established and generally acknowledged; and the clause in the assignment which gives rise to the present controversy seems to have been drawn with reference to their existence and practical operation. The assignee is not exempted from accountability for gross negligence, but is exonerated from the consequence of negligence in any inferior degree.

The creditors of Mr. White were the beneficiaries in the trust created by the assignment. They became the owners in equity of the assigned property. They were entitled to the whole of it until their debt should be satisfied; and to all the rights and remedies which the law would have given them if they had created the trust.

A failing debtor, by an assignment, puts his property where it can not be reached by ordinary legal process. He puts it into the hands of a trustee of his own selection; often his particular friend, sometimes a man to whom the creditors would not have been willing to confide such a trust. The debtor has an interest in the application of the trust funds to the payment of his debts; but the creditors have usually a far greater interest therein; and that interest depends in many cases on the competency and diligence of the assignee. The debtor can not be permitted by creating a trust for his creditors to place his property where it can not be reached by ordinary legal remedy, and at the same time exempt the trustee from his proper responsibility to his creditors.

What degree of diligence, then, would the assignee have been bound to exercise in the business of his trust, if the clause in question had been omitted? This question is answered by one elementary writer in these words: "A trustee is bound to manage the trust property for the benefit of the *cestui que trust* with the care and diligence of a provident owner:" Willis on Trustees, 125; and by another as follows: "A trustee is called upon to exert precisely the same care and solicitude in behalf of his *cestui que trust* as he would do for himself, but greater measure than this a court of equity will not exact:" Lewin on Trustees, 152. And in Story's Equity it is said that where a trustee has acted

in good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property: Sec. 1272. The first of these writers measures the liability of the trustee by the diligence of a provident owner; the two last mentioned, by the diligence of the trustee in his own concerns. But there is no substantial difference between them. The degree of diligence which a trustee uses in his own affairs can not properly be the subject of judicial inquiry. Every trustee must be presumed by the court before whom his account is taken to use in his own concerns such diligence as is commonly used by all prudent men: Jones on Bail. 30. The diligence of a provident man, therefore, is the measure of a trustee's duty. If it were otherwise, there would be one rule for a careless, and a different rule for a vigilant, trustee; and the careless trustee would be exonerated in the same case in which the vigilant would be held liable. This was never intended either by the elementary writers or by the authorities from which they deduce these conclusions.

In section 1268 of Story's Equity it is suggested that inasmuch as a trustee is not entitled to a compensation for his services, he would seem, upon analogous principles applicable to bailments, to be liable only, like a gratuitous bailee, for gross negligence. But he adds, however, that it would be difficult to affirm that courts of equity do in fact always limit the responsibility of trustees, or measure their acts by such a rule.

In some of the English decisions the liability of a trustee seems to have been determined upon the analogy between a trust and a gratuitous bailment; but such a rule can not be applicable to trustees within this state, because they are in fact entitled to compensation by way of commissions on moneys received and paid: *Meacham v. Sternes*, 9 Paige, 403; and although the smallness of their compensation may be a good reason for judging them with indulgence and liberality, they can not be placed on the footing of gratuitous bailees.

But in the case under consideration the assignment gives the trustee the right to retain the expenses of the trust and a reasonable compensation for his services in its execution. He stands therefore, in regard to his obligation to exercise diligence, in the light of a paid agent for the parties interested, and not in that of a gratuitous bailee or trustee. Such an agent is liable for ordinary negligence, or the want of that degree of

diligence which persons of common prudence are accustomed to use about their own business and affairs: Story's Agency, sec. 183.

The debtor therefore has in this assignment exonerated the trustee from the duty of exercising ordinary diligence in the execution of the trust; and the creditors, if they act under it and claim or accept dividends, are bound by its terms and conditions. In case of a loss in the collection of the assets, or in the keeping or the management of the trust fund, for the want of that degree of diligence, the loss must fall on them. A case might happen in which a great portion of the fund might be lost in this way. A failing debtor can not be permitted to put at hazard the trust fund which justly belongs to his creditors, by authorizing the trustee to manage it without due prudence and caution.

It was suggested upon the argument that the covenant of the trustee to execute the trust to the best of his ability bound him to exercise all the diligence required by his duty as trustee. But this is qualified, and we think controlled, by that which immediately follows, and exonerates him from liability. Such doubtless was the meaning of the parties, and so the instrument is to be understood.

The judgment below ought to be affirmed.

MORSE, J., being related to the parties, gave no opinion.

Judgment affirmed.

ASSIGNMENT CONTAINING PROVISION THAT ASSIGNEE SHALL NOT BE LIABLE for any losses that may occur in the management of the estate, except in cases of gross and willful neglect, is void: *Metcalf v. Van Brunt*, 37 Barb. 627; *McIntire v. Benson*, 20 Ill. 502, both citing the principal case. An assignee under a voluntary assignment for the benefit of creditors is chargeable with the care of a provident owner, and is liable for a loss occasioned by ordinary negligence: *Cornwell v. Deck*, 8 Hun, 124; *James v. Cowing*, 17 Id. 267, both citing the principal case. An assignee can not be allowed for counsel fees and disbursements paid in defending actions against the assignor, or in any litigation not involved in the performance of the duties required by the trust: *Levy's Accounting*, 1 Abb. N. C. 181, citing the principal case.

TRACY v. ALBANY EXCHANGE COMPANY.

[7 NEW YORK (3 SEDGWICK), 472.]

COVENANT IN LEASE THAT TENANT SHALL HAVE REFUSAL OF THE PREMISES for another term, saying nothing about the rent for such renewed term, binds the landlord to give a renewal at the same rent.

RENEWAL OF LEASE MAY BE CLAIMED BY TENANT, under an independent covenant in the lease that he shall have one, notwithstanding the original term has not yet expired, and notwithstanding some rent remains due from him to the landlord on account of the original term.

APPEAL from a judgment in favor of plaintiff in an action for damages for breach of covenant to renew a lease. The facts are given in the opinion.

Marcus T. Reynolds, for the appellant, the landlord covenanting to renew.

Nicholas Hill, jun., for the defendant, the tenant.

By Court, JEWETT, J. This was an action for a breach of covenant on the part of the defendant, in refusing to renew a lease of certain premises situate in the city of Albany. The lease was executed by the parties on the first day of February, 1847, granting the premises to the plaintiff for two years and six months from the first day of November, 1846, at the rent of one thousand dollars per year, payable quarterly, and contained the following covenant: "The said party of the second part to have the refusal of the premises at the expiration of this lease for three years longer." On the first day of February, 1849, the plaintiff requested the defendant to execute to him a new lease of the premises for three years from the first day of May following at the same rent as that reserved in the lease before mentioned, the latter being the day on which the then term would expire. The defendant refused to do so, unless the plaintiff would pay one thousand two hundred dollars per year rent, instead of one thousand dollars, and subsequently gave notice to the plaintiff that unless he would take a new lease for the premises, at a rent of one thousand two hundred dollars per annum therefor, the defendant would rent the premises to another. Subsequently, and on the tenth day of February, 1849, the plaintiff took from the defendant a lease for one year from the first day of May following, at the rent of one thousand two hundred dollars per annum, protesting at the same time against the right of defendant to exact an increased rent, and claiming to reserve his right of action, and for which this action is brought. It is admitted by the pleadings that the plaintiff demanded performance of the covenant at the expiration of the first term, and that the defendant refused. This is an averment in the complaint, and there is no denial in the answer. It is admitted that the premises were worth one thousand two hundred dollars per year, and were rented by the defendant for that sum. It was also admitted that

the sum of fifty-seven dollars remained due on account of the rent of the premises, from the plaintiff to the defendant, from the first day of February, 1849, being part of the quarter-rent falling due on that day, and the further sum of two hundred and fifty dollars, from the first day of May, 1849, being the quarter's rent due on that day, which sums still remain unpaid, to recover which the defendant had brought a suit against the plaintiff. A jury trial was waived, and upon closing the evidence, the counsel for the defendant stated several grounds upon which the defendant was entitled to judgment upon the facts proved; but the judge decided that the plaintiff was entitled to recover the sum of six hundred dollars, less a rebate of interest on two hundred dollars from the day of the trial to the first day of May, 1851. The defendant excepted. The decision of the main question arising in this case must turn upon the true construction of the words of the covenant, for a breach of which this action is brought, which are: "The said party of the second part to have the refusal of the premises at the expiration of this lease for three years longer." There are several decisions showing that a covenant in a lease to renew it, without providing in respect to the term to be granted or the amount of rent to be paid, implies a renewal for the same term and rent. But a covenant to renew upon such terms as might be agreed upon is void for uncertainty: *Rutgers v. Hunter*, 6 Johns. Ch. 218; *Whitlock v. Duffield*, 1 Hoffm. Ch. 110; 4 Kent's Com. 108; *Abeel v. Radcliff*, 13 Johns. 297 [7 Am. Dec. 377]; 1 Hilliard Ab., c. 15, sec. 78.

Whatever ambiguity there may be in the words of the covenant, the intention of the parties to be collected from them, considered in connection with the whole instrument, obviously was that the plaintiff at his election should have a renewal of the lease for the premises for the further term of three years, to commence at the expiration of the existing lease, for the same annual rent as the former, payable quarter-yearly. Although the intent of the parties be in opposition to the strict letter of the contract, it must prevail when clearly ascertained from it: 2 Kent's Com. 555; *Parkhurst v. Smith*, Willes, 332; *Hathaway v. Power*, 6 Hill, 453; *Earl of Clanrickard's Case*, Hob. 277.

The plaintiff was not restricted to the time when the term granted by the lease expired to make his election for a renewal for the further term; and if made, and a renewal demanded, the defendant was bound to comply with his covenant in that respect. The plaintiff in February, 1849, made his election and

demanded a performance; the defendant refused, unless he would consent to take a renewal at an enhanced rent, and gave him notice that unless he would do so the defendant would rent the premises to another. This I think constituted a breach of the covenant by the defendant. The taking of the lease by the plaintiff for a different term under the circumstances could not operate as a surrender of the first, or as a performance of the covenant by the defendant. The term of this second lease did not commence until the expiration of the first. And besides, the evidence shows that it was not intended by the plaintiff to relinquish a surrender, or by the parties that it should be accepted as a performance of the covenant, and that should be regarded as decisive of the question: *Gybson v. Searl*, Cro. Jac. 176; *Van Rensselaer v. Penniman*, 6 Wend. 569, 579; *Bogart v. Burkhalter*, 1 Denio, 125.

As to the objection made by the defendant that there was rent in arrear, and therefore the plaintiff was not entitled to a further lease, the covenant being independent, the liability of the defendant for the breach of the covenant in question remained. The payment of the rent was not a condition precedent to the right of the plaintiff to a renewal of the lease under the covenant, and he might bring his action for a breach of it, although he was guilty of a default in the payment of his rent or performance of his covenant: *Dawson v. Dyer*, 5 Barn. & Adol. 584.

The measure of damages was correct. It was confined to the difference between what the plaintiff was to have paid for the rent for the term and what he was compelled to pay under the new lease: *Masterton v. Mayor of Brooklyn*, 7 Hill, 61 [42 Am. Dec. 38]; *Driggs v. Dwight*, 17 Wend. 71. The judgment should be affirmed.

Judgment affirmed.

SIMPLE COVENANT TO RENEW LEASE implies a renewal for the same term and at the same rent: *Western T. C. of B. v. Lansing*, 49 N. Y. 503; *Cunningham v. Pattee*, 99 Mass. 252, both citing the principal case.

MEASURE OF DAMAGES FOR NOT GIVING LEASE is the actual value of the bargain which the plaintiff has made: *Mack v. Patchin*, 42 N. Y. 172; *Kidd v. McCormick*, 83 Id. 397, both citing the principal case. If a covenantor breaks his covenant, he puts himself without the pale or protection of the rule of damages, and becomes liable upon his broken covenant for the value of the estate he was instrumental in taking from his grantee: *Mack v. Patchin*, 29 How. Pr. 31, citing the principal case. See also *Driggs v. Dwight*, 31 Am. Dec. 283, note 285, where other cases are collected.

TO CONSTITUTE COVENANT RUNNING WITH LAND, no particular words are

essential, and it is sufficient, if, from the whole instrument, it appears that such was the apparent intention of the parties: *Wilkinson v. Pettit*, 47 Barb. 233, citing the principal case.

RIGHT TO RENEWAL OF LEASE IS PROTECTED BY EQUITY: See *Physe v. Wardell*, 28 Am. Dec. 430, note 436.

ALLEN v. PATTERSON.

[7 NEW YORK (3 SLEDMN), 476.]

COMPLAINT WHICH ALLEGES THAT DEFENDANT IS INDEBTED TO PLAINTIFF in a specified sum, for goods sold and delivered by plaintiff to defendant at his request, at, etc., and that there is now due to plaintiff from defendant a sum specified, for which he demands judgment, is sufficient under the New York code of procedure.

APPEAL from a judgment affirming a judgment overruling a demurrer. The complaint demurred to was in the following form, the ground of demurrer being that it did not state facts sufficient to constitute a cause of action: "The plaintiffs complain against the defendant for that the defendant is indebted to the plaintiffs in the sum of three hundred and seventy-one dollars and one cent, for goods sold and delivered by the plaintiffs to the defendant, at his request, on the first day of May, 1849, at the city of Buffalo, in said county. And the plaintiffs say that the items in their account exceed twenty in number. And the plaintiffs say that there is now due them from the defendant the sum of three hundred and seventy-one dollars and one cent, for which sum the plaintiffs demand judgment against the defendant, with interest from the twentieth day of October, 1849, besides costs." The judge before whom the demurrer was first argued held (in an opinion not reported, following *Tucker v. Rushton*, 2 Code Rep. 59), that the complaint, though inartistic, stated all the facts necessary to support an inference of indebtedness for goods sold, which view was sustained by the full bench; and from their decision the defendant appealed.

George F. Comstock, for the appellant.

Nicholas Hill, jun., for the respondents.

By Court, JEWETT, J. The code requires that a complaint shall contain a plain and concise statement of the facts constituting the cause of action: Sec. 142. Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated. This rule of pleading in

an action for a legal remedy is the same as formerly in this, that facts, and not the evidence of facts, must be pleaded: 1 Ch. Pl. 215; *Read v. Brookman*, 3 T. R. 159, *per Buller, J.*; *Eno v. Woodworth*, 4 N. Y. 249 [53 Am. Dec. 370].

The plaintiffs in their complaint in this action state that the defendant is indebted to the plaintiffs in the sum of three hundred and seventy-one dollars and one cent, for goods sold and delivered by the plaintiffs to the defendant at his request, on the first day of May, 1849, at the city of Buffalo in said county of Erie, and that the items of their account exceed twenty in number, and that there is now due them from the defendant the sum of three hundred and seventy-one dollars and one cent, for which they demand judgment against the defendant, with interest from the twentieth day of October, 1849, besides costs. In substance stating that on the first day of May, 1849, at the city of Buffalo, in the county of Erie, the plaintiffs, at the request of the defendant, sold and delivered to him goods for which he then owed or was then bound to pay the plaintiff the sum of three hundred and seventy-one dollars and one cent, and that the items of their account of such goods exceeded twenty in number; and further averring that there was then due them from the defendant the sum of three hundred and seventy-one dollars and one cent (that is, that the time when the said money for said goods was promised to be paid had expired), for which sum the plaintiffs demand judgment, etc. The question is, then, Are there facts enough stated to constitute a cause of action? I think that there are.

The words "that the defendant is indebted to the plaintiffs in the sum of three hundred and seventy-one dollars and one cent, for goods sold and delivered by them to him at his request, on the first day of May, 1849, and that there was then due to the plaintiffs from the defendant said sum," clearly imply that a contract had been made between the plaintiffs and defendant, by which the former sold and delivered the latter goods at his request, for which he promised to pay the plaintiffs the sum of three hundred and seventy-one dollars and one cent; and that the period when the same was promised to be paid had expired. It contains every statement of fact necessary to constitute a good *indebitatus* count in debt, according to the mode of pleading before the code: 2 Ch. Pl., ed. 1812, p. 142; *Emery v. Fell*, 2 T. R. 28; 1 Ch. Pl. 345.

The counsel for the defendant insisted that the statement that there is "due," etc., did not amount to a statement that

the debt had become payable; that it meant no more than the statement that the defendant is "indebted," etc., and that if the word "due" had two significations, the pleader could not select between them, and impute to it the one which suits his purpose best; for the maxim was, that everything should be taken most strongly against the pleader, or if the meaning of the words be equivocal, and two meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading. In the case of *United States v. The State Bank of North Carolina*, 6 Pet. 29, Judge Story said that the term "due" was sometimes used to express the mere state of indebtedness, and that it was an equivalent to "owed" or "owing," and it was sometimes used to express the fact that the debt had become payable. In the latter sense I think that the word "due" was used by the pleader in the complaint in this suit, and in that sense it may be deemed to have been used. In 1 Ch. Pl. 241, it is said that it is a maxim in pleading that everything shall be taken most strongly against the party pleading, or rather, that if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them; for it is to be intended that every person states his case as favorably to himself as possible: but that the maxim itself must be received with some qualification, for the language of the pleading is to have a reasonable intendment and construction; and when a matter is capable of different meanings, that shall be taken which will support the declaration, etc., and not the other, which will defeat it: *Wyat v. Aland*, 1 Salk. 325. The code, section 159, declares that in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties; and section 140 provides that the rules by which the sufficiency of the pleadings is to be determined are modified as prescribed by that act. I think, then, that we are not only authorized but required to consider that the term "due" was used in the complaint to express the fact that the money sought to be recovered had become payable; or the time when it was promised to be paid had elapsed. The judgment should be affirmed with costs.

Judgment affirmed.

COMMON COUNTS, HOW FAR ALLOWABLE UNDER CODE SYSTEM OF PLEADING.—In the common-law system of pleading, the common counts were of four descriptions: 1. The *indebitatus* count; 2. The *quantum meruit* count; 3. The *quantum valebat* count; 4. The account stated. The *indebitatus*

count stated that the defendant was, on a certain day named, indebted to the plaintiff in a named sum of money, as for use and occupation, or for personal services, or for money lent, paid out, or had and received, or for interest, or for some other pre-existing debt or simple contract, incurred at the defendant's request, and that being so indebted, the defendant, in consideration thereof, then promised the plaintiff to pay him the said sum of money on request. The *quantum meruit* count stated that whereas, in consideration "that the plaintiff had done work at the request of the defendant, he, the defendant, promised the plaintiff to pay him so much money as he reasonably deserved to have; and the count then averred that the plaintiff deserved to have a named sum, whereof the defendant had notice. The *quantum valebat* count was, in general, confined to the case of a claim for goods sold, and stated that "the defendant promised to pay so much as the goods were reasonably worth;" and it concluded with an averment that they were reasonably worth a named sum, and that the defendant had notice thereof. The account stated alleged that the defendant, on a named date, was indebted to the plaintiff in a named sum, for money found to be due from the defendant to the plaintiff on an account then stated between them, and averred a promise as in the *indebitatus* count: 1 Ch. Pl. 351. In all these counts the implied promise was averred as if it were express: 1 Bates Pleading under the Codes, 571.

The principal case was the first one in which the question arose how far the use of the common counts could be permitted in the system of pleading introduced by the codes. It is regarded as the great leading case on the subject under discussion, and while its doctrine has, by some able and learned judges and writers, been questioned, it has been very generally accepted and followed by the courts of those states in which the code system has been adopted. And in subsequent cases the courts have almost unanimously decided that a complaint or petition substantially the same in its form and in its allegations as the old common counts in *assumpsit* is in accordance with the fundamental principles of the code procedure, and is a good pleading. Such complaints or petitions are held to sufficiently set forth a cause of action in the cases where the declarations after which they are modeled would have been proper under the former practice: Pomeroy on Remedies and Remedial Rights, sec. 542; 1 Bates Pleading under the Code, 571; Green's Pleading and Practice under the Code, sec. 652; Bliss on Code Pleading, sec. 158 et seq.; *Ball v. Fulton County*, 31 Ark. 379; *Wilkins v. Stidger*, 22 Cal. 231; *Abadie v. Carrillo*, 32 Id. 172; *Merritt v. Glidden*, 39 Id. 559; *Parisch v. Benn*, 48 Id. 384; *Magee v. Kast*, 49 Id. 141; *De La Guerra v. Newhall*, 55 Id. 21; *Brown v. Perry*, 14 Ind. 32; *Wolf v. Schofield*, 38 Id. 175; *Johnson v. Kilgore*, 39 Id. 147; *Bouslog v. Garrett*, Id. 338; *Curran v. Curran*, 40 Id. 473; *Commissioners of Jennings County v. Verbarg*, 63 Id. 107; *Humphrey v. Fair*, 79 Id. 410; *Meagher v. Morgan*, 3 Kan. 372; *Clark v. Fensky*, Id. 389; *Emelie v. City of Leavenworth*, 20 Id. 562; *Carroll v. Paul's Adm'r*, 16 Mo. 226; *Stout v. St. Louis Tribune Co.*, 52 Id. 342; *Higgins v. Germaine*, 1 Mont. 230; *Farron v. Sherwood*, 17 N. Y. 227; *Hosley v. Black*, 28 Id. 438; *Hurst v. Litchfield*, 39 Id. 377; *Sloman v. Schmidt*, 8 Abb. Pr. 5; *Betts v. Bache*, 14 Id. 279; *Evans v. Harris*, 19 Barb. 416; *Goeltz v. White*, 35 Id. 78; *Bates v. Cobb*, 5 Bosw. 29; *Cudlipp v. Whipple*, 4 Duer, 610; S. C., 1 Abb. Pr. 107; *Adams v. Holley*, 12 How. Pr. 326; *Felle v. Festvali*, 2 Keyes, 152; *Jones v. Mial*, 82 N. C. 252; *Graanis v. Hooker*, 29 Wis. 65. In almost every one of these decisions the principal case is cited with approval. The following rule is also held by the authorities to be still in force under the codes: "When

the plaintiff has entered into an express contract with the defendant, and has fully performed on his part, so that nothing remains unexecuted but the defendant's obligation to pay, he may if he please sue upon the defendant's implied promise to make such payment, rather than upon the express undertaking of the original contract." And it is held that to that end he may resort to a complaint identical with the ancient common counts: Pomeroy on Remedies and Remedial Rights, sec. 543; *Friermuth v. Friermuth*, 48 Cal. 42; *Kerstetter v. Raymond*, 10 Ind. 199; *Brown v. Perry*, 14 Id. 32; *Emslie v. City of Leavenworth*, 20 Kan. 562; *Carroll v. Paul's Adm'r*, 16 Mo. 226; *Stout v. St. Louis Tribune Co.*, 52 Id. 342; *Farron v. Sherwood*, 17 N. Y. 227; *Hosley v. Black*, 28 Id. 438; *Hurst v. Litchfield*, 39 Id. 377; *Suedorf v. Schmidt*, 55 Id. 319; *Atkinson v. Collins*, 9 Abb. Pr. 353; *Beekman v. Flattner*, 15 Barb. 550; *Evans v. Harris*, 19 Id. 416; *Fells v. Vestvall*, 2 Keyes, 152; *Green v. Gilbert*, 21 Wis. 395. But see, contra: *Davis v. Mason*, 3 Or. 154. Referring to the rule last stated, Strong, J., delivering the opinion of the court in *Farron v. Sherwood*, 17 N. Y. 230, said: "This rule is not affected by the code; the plaintiff might, as he has done, rest his action on the legal duty; and his complaint is adapted to and contains every necessary element of that cause of action. It was not necessary to state in terms a promise to pay; it was sufficient to state facts showing the duty from which the law implies a promise; that complies with the requirement that facts must be stated constituting the cause of action." The requisition of the code that the complaint must contain a plain and concise statement of the facts constituting a cause of action is held to be satisfied by the general allegation of indebtedness for goods sold and delivered: *Moffet v. Sackett*, 18 Id. 522; *Keteltas v. Myers*, 19 Id. 231; *McMasus v. Ophir S. M. Co.*, 4 Nev. 15, all citing the principal case. And a complaint in an action for goods sold, substantially in the old form of a declaration in *indebitatus assumpit*, is good under the code: *Cudlipp v. Whipple*, 4 Duer, 610; S. C., 1 Abb. Pr. 107; *Merwin v. Hamilton*, 6 Duer, 253; *Drake v. Cockroft*, 10 How. Pr. 377; S. C., 1 Abb. Pr. 206; *Graham v. Camman*, 13 How. Pr. 360; *Chesbrough v. New York & E. R. R. Co.*, Id. 557; *Levy v. Ely*, 15 Id. 395; *Waters v. Clark*, 22 Id. 104; *Betis v. Bache*, 14 Abb. Pr. 279; *Roediger v. Simmons*, 14 Abb. Pr., N. S., 258; *Higgins v. Germaine*, 1 Mont. 230, all citing the principal case.

The old common money counts are still good: *Adams v. Holley*, 12 How. Pr. 328; *Sloman v. Schmidt*, 8 Abb. Pr. 5, both citing the principal case. And so are the common counts in an action on a bill of exchange: *Levy v. Ley*, 6 Id. 89; *Howard v. Richards*, 2 Nev. 128, both citing the principal case. These are given as instances in which the common counts have been held good under the code. It seems, however, that the common counts can not be pleaded together in the same complaint. Green says: "We regard it as clearly settled that, under the code system, the common counts can not properly be pleaded together in the same manner as at common law. It seems hardly possible to reconcile such a mode of pleading with the provisions of the code system:" Green's Pleading and Practice under the Code, sec. 652.

It will be seen from the authorities already cited that the doctrine that the old common counts in *assumpsit* are still permissible under the code system of pleading is firmly established. It may not be out of place, however, to here present the views of some judges and writers of eminence who believe that, on principle, the use of the common counts is not compatible with the principles of the code system. In the case of *Abadie v. Carrillo*, 32 Cal. 175,

Sanderson, J., delivered the following concurring opinion, in which Rhodes, J., expressed his concurrence: "If the question presented by the record in this case was new, I should be inclined to hold the complaint bad, upon the ground that it does not state facts sufficient to constitute a cause of action. Notwithstanding the many decisions to the contrary, I have never been able to regard the common counts as consistent with our code practice, which was intended to provide a uniform mode of pleading in all cases. The fundamental rule in our system of pleading requires a statement of the facts constituting the cause of action or defense in ordinary and concise language, so that the precise matters intended may appear upon the face of the pleading, and the opposite party need not be put upon his outside knowledge for the purpose of ascertaining what is meant. I do not think the common counts satisfy this rule, and must regard their retention as impairing the symmetry of our system; but a contrary view was adopted at the outset, and has been uniformly adhered to since. The matter is not of sufficient importance to justify us in disturbing a rule so long settled. For these reasons I concur in the judgment."

Professor Pomeroy says on this subject: "In the face of this overwhelming array of authority, it may seem almost presumptuous even to suggest a doubt as to the correctness of the conclusions that have been reached with so much unanimity. I can not, however, consistently with my very strong convictions, refrain from expressing the opinion that, in all these rulings concerning the common counts, the courts have overlooked the fundamental conception of the reformed pleading, and have abandoned its essential principles. This position of inevitable opposition was clearly, although unintentionally, described by one of the judges in language already quoted, when he says, 'We are inclined to sanction the latter view, and to hold that the facts which, in the judgment of the law, create the indebtedness or liability, need not be set forth in the complaint.' Now, the 'facts which create the liability' are the 'facts constituting the cause of action,' which the codes expressly require to be alleged; the two expressions are synonymous; and the direct antagonism between what the court says need not be done and what the statute says must be done is patent. But the objection to the doctrine of these decisions does not chiefly rest upon such verbal criticism; it is involved in the very nature of the new theory when contrasted with the old methods. In every species of the common count, the averments, by means of certain prescribed formulas, presented what the pleader conceived to be the legal effect and operation of the facts instead of the facts themselves, and the most important of them was always a pure conclusion of law. The count for money had and received well illustrates the truth of this proposition. In the allegation that 'the defendant was indebted to the plaintiff for money had and received by him to the plaintiff's use,' the distinctive element was the phrase 'money had and received to the plaintiff's use.' This technical expression was not the statement of a fact in the sense in which that word is used by the codes; if not strictly a pure conclusion of law, it was at most a symbol to which a certain peculiar meaning had been given. The circumstances under which one person could be liable to another for money had and received were very numerous, embracing contracts express or implied, and even torts and frauds. The mere averment that the defendant was indebted for money had and received admitted any of these circumstances in its support, but it did not disclose nor even suggest the real nature of the liability, the actual cause of action upon which the plaintiff relied. The reformed theory of pleading was expressly designed to abrogate forever this general mode of averment,

which concealed rather than displayed the true cause of action; it requires the facts to be stated, the facts as they exist or occurred, leaving the law to be determined and applied by the court. The same is true of the common count in every one of its phases. A careful analysis would show that the important and distinctive averments were either naked conclusions of law, or the legal effect and operation of the facts expressed in technical formulas to which a particular meaning had been attached, and which were equally applicable to innumerable different causes of action. The rule which permitted the general count in *assumpsit* to be sometimes used in an action upon an express contract was even more arbitrary and technical, and was wholly based upon fictitious notions. The conception of a second implied promise resulting from the duty to perform the original express promise has no foundation whatever in the law of contract, but was invented, with great subtlety, in order to furnish the ground for a resort to general *assumpsit* instead of special *assumpsit* in a certain class of cases. All the reasons in its support were swept away by the legislation which abolished the distinctions between the forms of action, since it was in such distinctions alone that those reasons had even the semblance of an existence. * * * The legislature certainly intended that the facts constituting each cause of action should be alleged as they actually happened, not by means of any technical formulas, but in the ordinary language of narrative; and it is, as it appears to me, equally certain that the use of the common counts as complaints or petitions is a violation of these fundamental principles:" Pomeroy on Remedies and Remedial Rights, sec. 544.

In Minnesota and in Oregon the courts seem disinclined to follow, to the full extent, the doctrine which prevails in the other states whose decisions have been cited above. In the case of *Foerster v. Kirkpatrick*, 2 Minn. 210, the complaint was in this form: "The complaint of the above-named plaintiffs respectfully shows to this court that the above-named defendants are indebted to them in the sum of seven hundred and sixty-three dollars and twelve cents, together with interest thereon from the sixteenth day of July, A. D. 1857, on account for goods, wares, and merchandise sold and delivered by the plaintiffs to the defendants at the special instance and request of the defendants. Wherefore the plaintiffs demand judgment," etc. The defendants demurred. The demurrer was overruled and judgment entered on demurrer. In the supreme court this judgment was reversed, and Atwater, J., who delivered the opinion of the court, said: "The complaint is defective. * * * No time is alleged when the goods were sold. But especially there is no allegation that the goods were of the value of the amount of the indebtedness claimed in the complaint, or of any value whatever, nor any allegation that the defendants ever promised to pay that or any amount whatever. In an action for goods sold and delivered, it is absolutely essential, in order to sustain the action, that one or the other at least of the allegations should be made. Without it the allegation of indebtedness is a mere conclusion of law, entirely unsupported by any fact. For the defendant's liability grows out of the fact that the goods were either worth the amount of the claim, or else that they promised to pay the amount. * * * Without one or the other of these allegations, there appears no consideration to support the pretended indebtedness. The allegation is also important to give the defendant notice of the ground upon which plaintiff claims that he may frame his answer and prepare his evidence accordingly." In the case of *Bowen v. Emerson*, 3 Or. 452, the complaint alleged that "on or about the eighteenth day of February, 1868, plaintiff sold and delivered to the defendant four thousand pounds of

flour, and that the same was worth two hundred and twelve dollars." The supreme court held that the complaint did not state facts sufficient to constitute a cause of action. Upton, J., who delivered the opinion of the court, referring to the principal case, said: "The opinion in that case, it must be conceded, is quite out of the general current of authority, and it is difficult to reconcile it with the numerous decisions in the same state that announce and reiterate the rule that the code requires facts to be stated, and not the conclusions that result from the facts. The opinion assumes, without argument and without citing any authority relating to the construction of any modern code, that the statement that the defendant is indebted to the plaintiff in a certain sum is the statement of a fact. * * * The statement that the defendant is indebted to the plaintiff is substantially the conclusion to be found by the jury at the end of the investigation." These two cases, though not sufficient to throw any doubt upon the rule established in so many states, are referred to for the purpose of elucidating the subject in hand.

THE PRINCIPAL CASE IS CITED in the cases given below, in support of the following propositions: The rule that once prevailed, that a pleading should be construed most strongly against the pleader, is now abrogated by the code: *Ollery v. Brown*, 51 How. Pr. 95. The language of a pleading is to be given a reasonable intendment and construction, and when a matter is capable of different meanings, that shall be taken which will support the declaration, not that which will defeat it: *Clare v. National City Bank*, 35 N. Y. Superior Ct. 265; S. C., 14 Abb. Pr., N. S., 330; *Woodbury v. Sackrider*, 2 Abb. Pr. 405; *Kidd v. Wilson*, 23 Iowa, 466; *Doolittle v. Green*, 32 Id. 124. The words "due" and "payable" are legally convertible terms: *Read v. Worthington*, 9 Bosw. 627; *Freeborn v. Glazer*, 10 Cal. 338; *Abadie v. Carrillo*, 32 Id. 174. *Grannis v. Hooker*, 29 Wia. 67. A defendant must aver in his answer every fact necessary to show a defense, partial or total: *Van De Sande v. Hall*, 13 How. Pr. 460. And the plaintiff must aver in his complaint the facts that constitute his cause of action: *Griygs v. City of St. Paul*, 9 Minn. 248; *Hollows v. Patton*, 26 Iowa, 544; *Jerome v. Stebbins*, 14 Cal. 458. An answer that states facts which if true would destroy the plaintiff's right to recover is good: *McDonald v. Davidson*, 30 Cal. 175. Where an answer consists merely of a denial, the defendant will only be permitted to controvert the facts alleged in the complaint: *Finley v. Quirk*, 9 Minn. 200. Facts, and not evidence of facts, must be pleaded: *Davenport Gas L. & C. Co. v. City of Davenport*, 15 Iowa, 20. A complaint must allege a present indebtedness: *Wetherhead v. Allen*, 4 N. Y. Ct. of App. Dec. 633; S. C., 3 Keyes, 566. In a suit for rent, a statement in the complaint that the sum is due is sufficient: *Elmer v. Sant C. T.*, 38 Ind. 56. In a complaint for the unlawful detention of personal property, under the code, it is not necessary to allege any demand and refusal: *Sims v. Cowan*, 56 Barb. 397. In an action for money had and received, it was never necessary to state in the complaint how or under what circumstances the money came to the hands of the defendant. The receipt of the money to the plaintiff's use is the fact which constitutes the cause of action: *Harpending v. Shoemaker*, 37 Id. 292. What is necessarily understood or implied in a pleading forms part of it, as much as if it was expressed: *Partridge v. Badger*, 25 Id. 170. When a sale is stated to have been made directly to the defendant, the words "sold and delivered" seem to imply a contract between the parties: *Acome v. American M. Co.*, 11 How. Pr. 27. The present system of pleading requires the plaintiff in his complaint to set forth the facts constituting his cause of action: *Gauley v. Wheeler*, 31 Id. 139. The facts constituting the cause of action must be

stated without repetition: *Nash v. McCanley*, 9 Abb. Pr. 160. The same strictness in pleading is not required under the code that was exacted by the courts under the former system: *Blackmar v. Thomas*, 28 N. Y. 71.

THE PRINCIPAL CARE IS APPROVED in *Chesbrough v. N. Y. & H. R. R. Co.*, 26 Barb. 14; *Huey v. Pinney*, 5 Minn. 323; and in *Morse v. Gilman*, 16 Wis. 503. And it was distinguished in *Keteltas v. Myers*, 1 Abb. Pr. 410.

CITY OF BUFFALO v. HOLLOWAY.

[7 NEW YORK (3 SELDEN), 493.]

CONTRACT WITH MUNICIPAL CORPORATION FOR EXCAVATING STREET does not imply an obligation to maintain guards and lights around it while the work is proceeding.

MUNICIPAL CORPORATION IS PRIMARILY BOUND TO KEEP EXCAVATION which it permits to be made in a street properly guarded; and can not cast this obligation on the contractor for the work, unless he has expressly assumed it.

APPEAL from a judgment reversing a judgment sustaining a demurrer to a complaint. The action was by the corporation of the city of Buffalo against a contractor for building a sewer in Elk street, in the city, who had left his excavation unguarded and unlighted at night, in consequence of which a traveler fell in, was injured, and recovered damages therefor from the city. The complaint claimed to recover reimbursement from the contractor, but the contract for the work, as alleged in the complaint, did not contain any provision requiring the contractor to maintain guards or lights at times when the workmen should be absent, and on this ground defendant demurred, claiming that without some such clause no cause of action was shown. The demurrer having been sustained as reported, 14 Barb. 101, the city appealed.

C. O. Pool, for the appellants.

John Ganson, for the respondent.

By Court, JEWETT, J. I consider it to be a well-settled rule of law at this day, notwithstanding there are some cases to the contrary, that the liability to make compensation for an injury arising from the negligent act of another attaches only on the person doing the act, or on the person employing him. The liability of any one other than the party actually guilty of any wrongful act proceeds on the maxim that he who does an act through the medium of another is in law considered as doing it himself—*Qui facit per alium facit per se*.

The party employing has the selection of the agent employed;

and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from his want of skill or want of care. But neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned: *Quarman v. Burnett*, 6 Mee. & W. 499; *Rapson v. Cubitt*, 9 Id. 711; *Milligan v. Wedge*, 12 Ad. & El. 737; *Laugher v. Pointer*, 5 Barn. & Cress. 547, opinion of Abbott, C. J., and Littledale, J.; *Hobbit v. The London and Northwestern Railway Co.*, 4 Exch. 254; *Blake v. Ferris*, 5 N. Y. 48 [55 Am. Dec. 304].

It is not necessary in this case to decide whether in any case the owner of lands or houses may not be responsible for nuisances occasioned by the manner in which his property is used by others not standing in the relation of servant to him. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a piece of land should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law which requires every one to enjoy his own property in such a manner as not to injure that of another person.

It may well be that the case alleged and proved by Mr. Tripp authorized a recovery against the city of Buffalo, upon the ground that the act which occasioned his injury was the negligent act of the agent or servant of that city in executing the contract made with it for the construction of the sewer; or upon the ground that the city of Buffalo improperly omitted to erect, maintain, and keep up the necessary lights, guards, and barriers about and in the vicinity of the pit or hole excavated in Elk street during the progress of the work.

The city of Buffalo was bound to exercise its right in constructing the sewer in a careful and prudent manner, so as to avoid injury resulting to others from it; and if it were prudent and necessary to erect, maintain, and keep lights, guards, and barriers about and in the vicinity of the place excavated during the progress of the work, in order to protect and prevent persons lawfully traveling and passing along the street from unavoidably fall-

ing into the pit or hole and thereby sustaining injury, it was its duty to do so, and consequently it is liable for injuries occasioned by the want of such proper precautionary measures. As between the city of Buffalo and the defendant, the obligation of the latter extended no further than to perform his part of the contract made for the construction of the sewer according to its terms with reasonable skill, and consequently he is only liable to the city to compensate it for such injuries as it sustained for want of the exercise of such skill in the performance of his contract in that manner. The complaint states that for the purpose of constructing the sewer, the defendant excavated the earth in or near the middle of Elk street, near the east end of the bridge on the canal slip, in such manner as to make a deep pit or hole near the east end of the bridge, about twelve feet in length, along the middle of the street, of the width of about four feet and of the depth of about fifteen feet, and that it then became and was the duty of the defendant while the pit or hole remained open, in the use of due care, to have erected and maintained lights, guards, and barriers about and in the vicinity of the pit or hole, to prevent and protect persons lawfully traveling and passing in, along, and upon Elk street from and against unavoidably falling therein; that while the pit or hole was open, the defendant wrongfully, carelessly, negligently, and improperly left it unguarded, and while so left, etc., Mr. Tripp, while lawfully passing along and upon Elk street, unavoidably fell into it, by means whereof he was greatly hurt, etc., and afterwards sued the city of Buffalo for such injuries, and recovered against it a certain sum, etc., therefor, which the said city had paid, etc. It will be observed that it is not stated or alleged in the complaint that it was not necessary for the defendant, in order to construct the sewer in pursuance of the terms of his contract, to excavate the pit or hole in every respect as it was done, or that there was any lack of skill manifested in executing the contract in that respect. The complaint, instead of stating facts and circumstances to show that it was the duty of the defendant to erect and keep up lights, guards, and barriers while the pit remained open, assumes that such was his duty, and proceeds at once to allege a breach of this duty.

The difficulty is, the want of any statement of facts from which such duty arises. For an allegation of the duty is of no avail, unless from the rest of the complaint the facts necessary to raise the duty can be collected. If the excavation to construct the sewer in the street in question was such as to make

it necessary and proper to erect lights, guards, and barriers in the vicinity, to render the passing of the street safe while open, it unquestionably was the duty of the city of Buffalo to have caused such precautionary measures to be taken. The city might have contracted with the defendant to take such measures; in that event, the duty as between him and the city would have devolved upon him, and he would have been liable for all the consequences resulting to it for any neglect on his part in observing his stipulations in that respect; or the city may have judged the measures unnecessary, and therefore omitted to provide for them in its contract with the defendant; or if otherwise, the city might have chosen to contract for the doing of that service with some other person. In either case, the defendant would owe no such duty to the city, whatever liability he might have incurred to others who suffered by the digging of the pit and leaving it open without such measures having been taken to guard against the danger which there was in passing in the street: *Seymour v. Maddox*, 5 Eng. L. & Eq. 265; 1 Chit. 370, 1812, by Day.

The complaint should contain a plain and concise statement of the facts constituting a cause of action: Code, sec. 142. In my opinion, the complaint in this case comes short of that. The defendant was at liberty, by section 144 of the code, to demur to it when it appeared upon its face that it did not state facts sufficient to constitute a cause of action. The judgment, therefore, should be affirmed.

Judgment affirmed.

LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE OF AGENTS in the performance of work authorized by law: See *Rochester White Lead Co. v. City of Rochester*, 53 Am. Dec. 316, note 320, where numerous cases on this subject are collected. See also *City of Tallahassee v. Fortune*, 52 Id. 358, note 364.

MUNICIPAL CORPORATION MAY RECOVER OF ONE NEGLIGENTLY LEAVING STREET UNSAFE single damages for an injury suffered by another through such defect, where such corporation has been compelled to pay double damages for the injury: *City of Lowell v. Spaulding*, 50 Am. Dec. 775, note 776, where other cases are collected.

MUNICIPAL CORPORATION IS PRIMARILY LIABLE for injuries arising from its neglect to keep its streets in a safe condition for the use of the public: *City of Springfield v. Le Claire*, 49 Ill. 479, citing the principal case. Where there is no stipulation in a contract between a municipal corporation and a contractor, who undertakes to build a sewer in its streets, that he will take all necessary precautions to prevent travelers from injury by falling into the excavation, he is under no obligation to do so: *Sulzbacher v. Dickie*, 6 Daly, 473; S. C., 51 How. Pr. 515; *Storrs v. City of Utica*, 17 N. Y. 109; *Creed v. Hartman*, 29 Id. 593, all citing the principal case. But when the contractor has stipulated to use the necessary precautionary measures to protect the

public against accidents, the owner or employer is relieved from responsibility: *Osborn v. Union Ferry Co.*, 53 Barb. 641, citing the principal case.

USE OF STREET OR CITY BY INDIVIDUAL FOR DRAINS, sewers, vaults, or cesspools is essentially a nuisance, and renders the party erecting or maintaining such nuisance liable for all damages sustained in consequence of the improper appropriation of the street to such merely personal use: *Wendell v. Mayor etc. of Troy*, 39 Barb. 336; *Gardner v. Bennett*, 38 N. Y. Superior Ct. 200, both citing the principal case. One who digs a hole in the public street and leaves it open and unguarded is liable for injuries to others arising from his negligence: *Biles v. Schaub*, 48 Barb. 343, citing the principal case. A person may be liable for the maintenance of a nuisance, although the acts complained of are not done either by himself or by his servants: *Vanderpool v. Husson*, 28 Id. 198, citing the principal case. The relation of superior and subordinate does not exist between the owner of a ferry franchise and one to whom he has leased it: *Blackwell v. Winsall*, 24 Id. 357; S. C., 14 How. Pr. 260, citing the principal case.

ANSWER THAT DOES NOT STATE FACTS which if true would bar the action, or so much of it as is attempted to be answered, is bad on demurrer: *Carter v. Kozley*, 14 Abb. Pr. 150; S. C., 9 Bosw. 588, citing the principal case.

STATEMENT IN COMPLAINT THAT BY MEANS OF CONTRACT, which is therein set out, it became the duty of the defendant to perform certain acts, is not sufficient unless the facts necessary to show the duty are also stated: *Ramsey v. Erie Railway Co.*, 7 Abb. Pr., N. S., 180; S. C., 33 How. Pr. 215, citing the principal case.

DEMURRER ADMITS ONLY FACTS ALLEGED, and not the inferences to be drawn from them: *Bewley v. Equitable L. A. S.*, 61 How. Pr. 346, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *City of Rochester v. Montgomery*, 72 N. Y. 69.

CASES
IN THIS
SUPREME COURT
OF
NORTH CAROLINA.

STATE v. BOON.

[13 IREDELL'S LAW, 244.]

IN BURGLARY THERE MUST BE BREAKING, REMOVING, OR PUTTING ASIDE of something material which constitutes a part of the dwelling-house and is relied on as a security against intrusion.

IT IS BURGLARY TO ENTER HOUSE BY MEANS OF RAISING WINDOW, though it was not then fastened.

EVIDENCE OF INTENT TO COMMIT RAPE IS SUFFICIENT TO BE SUBMITTED to JURY when it shows that the prisoner entered a room where a young lady was sleeping by means of raising a window, went to the bed, grasped her ankle, and hastily retreated, without any attempt at explanation when she screamed.

INDICTMENT for burglariously entering a room in the house of one Owen. The indictment contained two counts: one charging the prisoner with an attempt to commit rape on Sarah Ann, the daughter of Owen; the other with an attempt to commit rape on Sarah Eliza, the granddaughter of Owen. Sarah Ann testified that she and Sarah Eliza slept together; that after entering the room they examined it, and found that no one was there; that shortly after she fell asleep some one touched her foot, awaking her; she saw the person in a stooping position by the bedside; the person then grasped her ankle, and she screamed, when he retreated and escaped by the window; that she had locked the door, and that the window was shut, but not fastened; that it was usual to fasten the window; that when she arose, the window was propped up by a stick. The court charged that the jury must be positive that it was the prisoner who entered, and that he entered with intent to commit rape. The counsel for

the prisoner prayed the charge that there was no evidence of intent; that if the window was usually fastened, and that on the night in question it was not fastened, the entry was not burglarious, although the window was closed. This charge was refused. Verdict of guilty; a motion for a new trial was denied, and an appeal was prayed and allowed.

William Eaton, jun., attorney general, for the state.

W. Winslow, for the defendant.

By Court, PEARSON, J. The exception in reference to the breaking is settled against the prisoner by the authorities. Passing an imaginary line is a "breaking of the close," and will sustain an action of trespass *quare clausum fregit*. In burglary, more is required—there must be a breaking, removing, or putting aside of something material which constitutes a part of the dwelling-house and is relied on as a security against intrusion. Leaving a door or window open shows such negligence and want of proper care as to forfeit all claim to the peculiar protection extended to dwelling-houses. But if the door or window be shut, it is not necessary to resort to locks, bolts, or nails; because a latch to the door and the weight of the window may well be relied on as a sufficient security. Chimneys are usually left open, yet if an entry is effected by coming down a chimney, the breaking is burglarious..

The motion in arrest of judgment, based on the distinction between felonies at common law and those created by statute can not be sustained. There seems to have been a doubt upon the question at one time, but the later authorities do not leave it open to discussion.

The exception in reference to the want of evidence of the felonious intent presents the only question as to which we have had any difficulty. The evidence of the intent charged is certainly very slight, but we can not say there is no evidence tending to prove it. The fact of the breaking and entering was strong evidence of some bad intent—going to the bed and touching the foot of one of the young ladies tended to indicate that the intent was to gratify lust. Taking hold of—"grasping," as the case expresses it—the ankle, after the foot was drawn up, and the hasty retreat without any attempt at explanation, as soon as the lady screamed, was some evidence that the purpose of the prisoner at the time he entered was to gratify his lust by force. It was therefore no error to submit the ques-

tion to the jury. Whether the evidence was sufficient to justify a verdict of guilty is a question about which the court is not at liberty to express an opinion.

Judgment affirmed.

BURGLARY, WHAT IS.—In *State v. Willis*, 7 Jones L. 190, 191, the above decision is cited to support the position of the court, that entering a dwelling-house by means of a chimney and stealing goods therein is burglary. See also definitions and examples of burglary in *State v. McCall*, 39 Am. Dec. 314; *State v. Wilson*, 1 Id. 216.

SLADE v. ETHERIDGE.

[18 IRVING'S LAW, 353.]

DIRECT LINE IS IMPLIED WHEN POINT IS DESCRIBED AS BEING GIVEN DISTANCE from a certain other point, unless there is something to rebut the implication; and it is not rebutted by the fact that both the points are on the banks of a river.

TRESPASS quare clausum fregit. Plaintiff claimed under a patent, bounded on the north by the second line of a patent to one Taylor, under whom defendant claimed. The case turned upon the beginning corner of the grant to Taylor. The boundaries of this grant and the instructions given by the court are stated in the opinion. Verdict for plaintiff; a motion for a new trial was overruled, and the defendant appealed.

Moore and Biggs, for the plaintiff.

Winston, jun., and Rodman, contra.

By Court, PEARSON, J. The case turned upon the location of the beginning corner of the grant to Taylor. The grant begins at a gum on Roanoke river, half a mile below Quitsny; and the third call is for a sycamore on the bank of the river, thence down the river to the beginning. It was proved that a black oak stump on the bank of the river was at a landing, and was the place called Quitsny. The gum could not be found.

The defendant's counsel requested the court to instruct the jury that "it was their duty to run a direct line, so as to strike the bank of the river half a mile below the stump, and in that way ascertain the location of the gum, or beginning corner."

The court refused so to charge, but instructed the jury "that, as the last call of the Taylor grant was from the sycamore down the river to the first station, it was their duty to follow the margin of the river from the stump half a mile down the river, in order to ascertain where the beginning corner had stood."

In this there is error. When a point is described as being a given distance from a certain other point, a direct line is implied, unless there be something to rebut the implication. We are not able to perceive how the fact that the stump in this case stood on the river, and the gum also stood on the river, half a mile below, has any tendency to show that a direct course is not to be adopted. If one is traveling by water, and asks the distance to a certain place, also on the water, we are apt to tell him, according to the course of the stream. If he is traveling by land, we are apt to tell him the distance according to the course of the roads. But surveyors and mathematicians speak of distances according to straight lines, and are always so to be understood unless there is something to show to the contrary.

His honor was of opinion that the last call, being from a sycamore on the river, down the river to the beginning, justified a departure from a direct line. That is true in reference to the last or "closing line" of the grant; but it has no bearing on the line from the stump to the gum. This latter line constitutes no part of the boundary, but is merely given to fix the location of the beginning corner; so the closing line has nothing to do with it.

Judgment reversed.

WATRCOURSE AS BOUNDARY: See *Bradley v. Rice*, 29 Am. Dec. 501, and note; *Lowell v. Robinson*, 33 Id. 673; and *Luce v. Carley*, 35 Id. 640, in the note to which reference is made to decisions in this series bearing on this subject; *Middleton v. Pritchard*, 38 Id. 119.

WALTERS v. JORDAN.

[13 INDELL'S LAW, 361.]

If Wife Commit Adultery After Leaving Her Husband, it is a tarrying so as to bar her of her right of dower under revised statutes, c. 121, sec. 11, barring a claim of the wife for dower if she willingly leave her husband and go away and continue with her adulterer, although she does not continually remain in adultery with him.

Wife Driven or Ordered Away by Husband on Account of Her Adultery is not barred of her dower under revised statutes c. 121, sec. 11, although she afterwards commit adultery with a new or former adulterer.

JUDGMENT SHOULD NOT BE REVERSED FOR ERROR IN IMMATERIAL INSTRUCTIONS.

Wife Was Entitled to Dower Though She Was Adulteress at common law.

PETITION for dower. Defendants pleaded in bar that the plaintiff willingly left her husband and went away and lived in adul-

tery with a certain negro slave without any reconciliation, and was therefore barred of her dower under revised statutes, c. 121, sec. 11, barring the claim of an adulteress for dower "if she willingly leave her husband and go away and continue with her adulterer." The evidence showed that while the plaintiff and her husband were living together she committed adultery with a negro slave, and her husband discovering it, drove her away from his house; that she had committed adultery subsequently with a negro, and since the death of her husband had become a lewd woman. The court charged the jury that if she was ordered away by her husband, though on account of her adultery, she was not willingly leaving her husband within the meaning of the act, and would not be barred of her dower, although she had committed adultery; and that the act of separation must be voluntary on the part of the wife, and there must be a remaining away and continuance in repeated acts of adultery to bring the case within the statute, and that a single act of adultery after her separation would not bar her dower. Verdict for the plaintiff. The defendants appealed.

Norwood, for the plaintiff.

E. G. Reade, contra.

By Court, RUFFIN, C. J. If the case depended upon the correctness of the latter parts of the instructions, the judgment would be reversed; as Lord Coke states very explicitly in 2 Inst. 435, that albeit the wife doth not continually remain in adultery with the adulterer, yet if she be with him and commit adultery, it is a tarrying within the statute of 13 Edw. I., c. 34, which is re-enacted in revised statutes, c. 121, sec. 11; and that if she once remain with the adulterer in adultery, and after he keepeth her against her will, or if the adulterer turn her away, yet she shall be said *morari cum adultero*, within the statute. The case of *Heathington v. Graham*, 6 Bing. 135, is also a clear authority, and upon sound reason, that there need not be any adultery before the wife leaves the husband, nor any elopement with the man with whom she afterwards commits adultery, but that she is barred by adultery with any person, entirely supervenient on a separation by mutual consent. There was evidence which, in the opinion of the court, tended to prove an act of adultery with a negro after the separation, though he is not identified to be the same one with whom the plaintiff was guilty while living with her husband; and that case the authorities show to be within the statute, provided it was also within it in respect to the

cause of her leaving her husband and his house. As to that, it seems clear upon the evidence, and stands admitted in the first part of the instructions prayed, that the husband ordered or drove her away. That being so, it appears to the court that the plaintiff can not be said to have willingly left her husband; but that, on the contrary, she left him against her will and by his compulsion, and therefore the case is not within the act, though she afterwards committed adultery with a new or former adulterer. That being so, all the other instructions became immaterial, and any error in them ought not to produce a reversal of the judgment.

The words of the act are in the conjunctive, and plain in themselves; and in such a case it would seem to be the province of the court to receive and carry them into execution according to their obvious meaning. Therefore, apparently, the ingredient that the wife should willingly leave her husband was in every case essential to the bar of the dower, given by the statute. But it is yielded that as our statute is but a re-enactment of an ancient one in England, the interpretation put on the original judicially, or by a commentator so wary and wise as Lord Coke, ought to be authoritative as to the construction of ours. Some passages in Lord Coke's reading on the statute Westm. 2 have been relied on to show that it is not material whether she left her husband willingly or not; and hence it is inferred that even the compulsion of the husband makes no difference. But the passages do not seem at all to authorize that inference. They are that "albeit the words be in the disjunctive, yet if the woman be taken away, not *sponle*, but against her will, and after consent, and remain with the adulterer, etc., she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry;" and then he states a case in which a man had made a sale and conveyance, by deed, of his wife to another man, whereon it was pleaded in bar to a writ of dower, *quia recessit a marito suo in vita sua, et vixit ut adultera cum*, etc.; and upon a demurrer to a replication of the husband's deed, it was adjudged for the defendant. Now those two cases are entirely distinct from the present, and seem no way analogous to it. In the latter case there was no compulsion on the wife by any one—either the adulterer or the husband. Nothing like it can be implied from any part of the pleadings, the deed, or Lord Coke's statement. But the contrary is apparent, namely, that the woman went willingly, for it is stated, just after the passage

above quoted, and in contrast with it, as a case in which she left *sponte*, while in the other it was otherwise, the words being, "if the wife goeth away"—not by compulsion of her husband, but with her husband's consent and agreement with A. B., and after A. B. commit adultery with her, and she remains with him, she shall be barred of her dower." That, therefore, is only a case where both parties were willing she should leave, and in fact, it was as much the wife's act as the husband's, and was, indeed, the authority on which that precise position was adjudged in *Hetherington v. Graham, supra*. The defendant's case seems to derive as little support from the other passage. The case under Lord Coke's consideration was obviously that of the forcible abduction of a woman by some other man, contrary alike to her own and her husband's will, and her consent afterwards to live in adultery with her violator; and it is in reference to that case it is said she loses her dower, for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer. That is founded on good reason; for the husband was in no manner accessory to her dishonor, and she did finally, though not at first, consent to it.

But it can not be supposed that Lord Coke would put on the same footing a case in which a husband aided in forcing his wife to submit to the violation of her person by one who took her away against her will, though after her degradation she might continue to live with the ravisher. Nor can it be more reasonably collected as his opinion that any case of compulsory expulsion of the wife by her husband could possibly be deemed her leaving and going away willingly. The two propositions are directly contradictory in terms; and no one could suppose such a case within the words or meaning of the law, if the expulsion were wanton and unprovoked. In such a case, the subsequent adultery would be regarded as a natural consequence of the husband's wrong, and he could take no benefit from it, nor deprive his wife of any. But it is said this was not a wrong done to the woman, but it was an act merited by her depravity and baseness, and demanded by his honor; and it is true there could be no greater injury inflicted on the rights or feelings of the husband than that perpetrated by this woman. But the court has no right to be wise beyond the legislature, and make a law for a hard case, nor, which is the same thing, bring such a case within a statute, the words of which will cover it, and which was made *diverso intuitu*. The laws must be framed and construed upon general principles, and not vary to meet contin-

gencies not in the contemplation of the legislature. Therefore, the construction of the act can not be influenced by the fact that the husband drove this woman away, by reason that, committing the particular adultery which was her offense, she descended to the lowest depths of infamy, more than if it had been for any other cause, as drunkenness, profanity, ungovernable temper, furious passions, and violent assaults, which rendered her society an intolerable annoyance, and made his life burdensome. Now, for these several acts, a husband may be more or less excusable in the eye of morality and the law, in refusing to cohabit with his wife, and expelling her from his house so as to have it in quiet to himself and the other members of his family. But that is not the point. It is, on the contrary, very different. By the common law, a wife was entitled to dower, though she were an adulteress. A statute was then made, whereby she was not deprived of dower merely by committing adultery, but was barred of it if she willingly left her husband, and afterwards lived away from him, and committed adultery. Adultery previous to her elopement or departure is not alluded to in the statute, and can not control the construction. If that had been intended to be a bar, or to affect the bar, why did not the statute confine itself at once to adultery simply? Instead of doing so, the object of the act is adultery subsequent to the willing leaving of the husband. It was very fairly argued at first that the case contemplated in the act was not only that expressly mentioned, in which the wife willingly left the husband, but that also the unworthiness of the husband was to be implied. That, however, is settled otherwise, and it is held that if they concur in separating, the case is within the act. But no case can be found in which the woman did not leave the husband willingly, but did so unwillingly, and moreover, by the compulsion of the husband himself, in which it was held against the wife, nor is there any *dictum* to give color to the proposition.

PEARSON, J., delivered a dissenting opinion.

Judgment affirmed.

DOWER BARRED BY WIFE'S ADULTERY: See *Beel v. Nealy*, 19 Am. Dec. 686, and note.

HETFIELD v. BAUM.

(18 IREDELL'S LAW, 394.)

SOVEREIGN HAS RIGHT TO WRECKS AND ALL PROPERTY STRANDED on the sea-beach.

RIGHT OF WAY IS RESERVED BY IMPLICATION TO WRECK COMMISSIONER ON GRANT OF LAND on "the banks," where there is no other way of getting to the shore.

ONE PURCHASING AT WRECK COMMISSIONER'S SALE IS NOT GUILTY OF TRESPASS in hauling the goods over the plaintiff's land, although forbidden to do so, where the goods could not be taken off in any other way without great inconvenience.

PRIVATE RIGHT OF WAY MAY EXIST BY NECESSITY.

TRESPASS quare clausum fregit. A brig had been wrecked on the plaintiff's land, and at the sale by the wreck-master, the defendant had been a purchaser. The goods could be taken off by sea, or might be carried along the beach, but both ways would cause great inconvenience, and consequently defendant carted them over the plaintiff's land as being the most convenient route, although forbidden to do so. The defendant contended that as the sale was authorized by law, every one had a right to attend, and carry off the articles he purchased in the most convenient manner over the land of adjoining proprietors, although forbidden to do so. The court instructed that, on the facts, the plaintiff was entitled to at least nominal damages. Verdict for nominal damages. The defendant appealed.

Ehringhaus, for the plaintiff.

Jordan and Smith, contra.

By Court, PEARSON, J. The sovereign has a right to wrecks and all property stranded on the sea-beach; and in many countries this right is exercised so as to be a source of considerable revenue.

North Carolina has a sea-coast, great in extent and very dangerous; and there are probably more wrecks upon her coast during the year than upon that of any five of the other states. She has, from a very early period, adopted a humane, liberal, and enlightened policy in reference to wrecks, and may well challenge a comparison of her policy with that of any other nation on earth.

The whole extent of her sea-coast is laid off into "wreck districts" of convenient size. It is made the duty of the courts of pleas and quarter sessions of the several counties in which such

districts are situated to appoint a "commissioner of wrecks" in each district, who shall reside in the district, and enter into bond, with good security, in the penalty of fifteen thousand dollars, for the proper discharge of his duties. It is made his duty, "on the earliest intelligence" of any vessel being in danger of being stranded, or being stranded, to command the sheriff, or any constable of the county, to summon as many men as shall be thought necessary to the assistance of such vessel. If the vessel is stranded, it is made his duty to see that the goods are collected and taken care of. Should the captain or owner desire it, he is at liberty to reship the goods; if they are lost or broken, it is his duty, after advertisement, to sell the goods at public action, to make a full return of the sales to the next court, and to pay into court the amount of sales, which fund is to be held for the owner or insurer. But if, after due advertisement, and after the expiration of one year and one day, no person applies for the fund, it is to be transmitted to the public treasurer of the state, for the use of the state. And the statute makes it a felony to embezzle or steal any stranded property, or to conceal the same, knowing it to have been stolen: R. S., c. 123, tit. Wrecks.

"The banks" is a narrow strip of land, mostly sand banks, from which the name is derived, interposed between the ocean and the sounds, and in the locality concerned in the case before us, extending from the Virginia line to Ocracoke inlet, without a single harbor; so that neither vessels nor boats can "live" in the ocean, and boats are only preserved by hauling them up on the banks; consequently, it is impossible for the commissioner of wrecks to go with his men to the assistance of a vessel in distress, or to collect and take care of wrecked or stranded property, or to expose the same to public auction, unless there be a right of way over the banks, and a right of ingress, egress, and regress, as often as may be necessary to preserve, take, and carry away such property as may be exposed to public auction, in pursuance of the laws of the state.

The question is, Where a grant issues for the land on the banks, is there a reservation of this right of way by necessity or by necessary implication? Does the state, by a grant of the land, deprive herself of the ability to carry into effect the provisions of this humane and noble statute, by which she has undertaken to assist the unfortunate, and to take care of and hold wrecked and stranded property as a "trustee" for the owner or insurer?

A public statute can not thus be abrogated by a grant of land, and there is, by necessary implication, a reservation of the right of way, or, in other words, the right of way exists of necessity. If one is shipwrecked, he has, of necessity, a right of way to go on "the banks," and of egress and regress, as often as may be necessary to take away his property, doing no unnecessary damage.

Baron Comyns, in his digest, informs us that a right of private way may be acquired by prescription, by grant, or "for necessity;" and among other instances he puts this: "So if a man has title to a wreck, he has a right to have a way over the land of another, where the wreck lies, to take it, of necessity:" 3 Com. Dig. 39, tit. Private Way.

In *Anonymous*, 6 Mod. 149, it is said: "Originally, all wrecks were in the crown, and the king has a right of way over any man's ground for his wreck, and the same privilege goes to a grantee thereof."

Lord Holt says: "He who gives up the way of coming at a thing, gives up the thing itself."

The plaintiff does not insist that, by a grant of the land, he acquired a right to all wrecked or stranded property; and yet, if this action is sustained, he will, in effect, be the owner, and have a franchise and "peculiar privilege" to take all such property as may be wrecked or stranded upon "his banks;" for he has only to say, "No one, except by my permission, has a right to cross over the bank," and thus all of the property becomes his at his own bid. Such a state of things is not and ought not to be tolerated.

It is said a right to fish or to bathe in the ocean is a public right, and belongs to every one, and yet there is no right of way reserved, or "existing of necessity," by which every person has a right, in order to fish or bathe, to pass over land adjacent to the beach, belonging to a third person; for this are cited *Blondel v. Cateral*, 5 Barn. & Ald. 51; *Ball v. Herbert*, 3 T. R. 253.

We concur in the principles of the cases cited, but there is an obvious distinction. Here there is a right in the sovereign, to the exercise of which the right of way is necessary, as occasion may require; therefore, it is implied, or exists of necessity. There the right of fishing or of bathing belongs to every one: it is not a right of the sovereign, but belongs to every one. We all, by nature, have a right to see by the light of the sun and to breathe the air of heaven, to bathe in the sea, and to catch

fish; but there is no necessity, and nothing from which to imply a right to go over another's land for these purposes. There is this further and very obvious ground of distinction: a right of way for the purpose of assisting a vessel in distress, or of collecting, taking care of, and selling property wrecked or stranded, is consistent with a grant of the land, because the right only exists as occasion may call for it; whereas, if every person has a right of way over land adjacent to the ocean, at all times and at all places, such an unlimited right is inconsistent with a grant of the land, and it does not exist "of necessity."

A venire de novo awarded.

RIGHT OF WAY BY NECESSITY.—The doctrines on this subject laid down in the above opinion are not applicable to the case of an unfenced cattle-range, and do not entitle the owner thereof to a right of way over adjoining land: *Caroon v. Doxey*, 3 Jones L. 23. See, for a definition and consideration of the subject, *Cooper v. Maupin*, 33 Am. Dec. 456, and note; *Nichols v. Luce*, 35 Id. 302, and note; *Landon v. Rivers*, 13 Id. 746, note; and the note to *Campbell v. Race*, 54 Id. 731.

LUSH v. McDANIEL.

[13 IREDELL'S LAW, 486.]

OPINIONS OF PERSONS THAT SLAVE SOLD AS SOUND WAS SUFFERING FROM SYPHILIS is not competent where such persons were not physicians.

DECLARATIONS OF SLAVE WOMAN AS TO HER SUFFERINGS and condition at any particular time are evidence of her state at the time she made them, in an action for a breach of warranty of soundness on her sale; but her declarations in reference to past periods are not admissible.

IN ACTION FOR BREACH OF WARRANTY OF SOUNDNESS IN SALE OF SLAVE who died from syphilis some months after the plaintiff purchased her, evidence that the disease was not known to have existed in the part of the country where she was sold, and was known to exist in the place to which she was carried, is admissible as affording some aid to the jury in establishing the probable period when she became infected.

APPEAL from the Buncombe county superior court. The opinion states the case.

J. Baxter and N. W. Woodfin, for the plaintiff.

Gaither, contra.

By Court, RUFFIN, C. J. This is an action on a covenant of soundness in a bill of sale of a female slave, alleging as a breach that at the time of the sale she had syphilis, and afterwards died of the disease. The defendant and the slave resided in Macon county, and the sale was made there on the twenty-

second of March, 1849. She was then brought by the plaintiff to his residence at Asheville, a distance of seventy-five miles, and died there the next August.

The plaintiff offered a witness, who was not a physician, to prove that in the spring of 1849 the slave told him in Asheville that she then had the disease, and also that she had it before the plaintiff purchased. But on objection, the court refused to admit the evidence.

The plaintiff then offered another witness, who was not a physician, to prove that soon after the plaintiff's purchase he examined the woman at Asheville, and that he was of opinion she then had the disease. But on objection the court also refused to admit the evidence. Then the plaintiff called physicians who attended the woman in the latter part of her life, and they deposed that she died of syphilis, which had reached its secondary stage, and produced ulcers in the throat, and in their opinion might have existed for several weeks, and probably for two or three months; that while attending her, in answer to their inquiries the woman stated her symptoms as to her pains, and their locality, and they were satisfied as to the nature of the disease, and that it produced her death. The plaintiff offered further to prove by them that she also told them that she had been so diseased and laboring under the same symptoms before the sale to the plaintiff. But on objection, the court refused to admit the last evidence. The defendant then offered to prove by the physicians that during the spring and summer of 1849 they found in their practice that syphilis was prevalent in Asheville, and the court, after objection, admitted the evidence. The defendant offered as witnesses two physicians who resided near the defendant in Macon county, and they stated that they had repeatedly known the disease to prevail there, but they had no recollection of any case at or about the time the slave was carried from there. This evidence was objected to by the plaintiff, but was admitted by the court. The jury found a verdict for the defendant, and the plaintiff appealed from the judgment.

The opinions of persons who are not physicians were not competent. In general, witnesses must speak to facts and are not to be heard as to their opinions. As an exception, it is established that persons practicing a profession or exercising a trade may deliver their opinions to the jury as evidence on questions of science or art belonging to their vocation. The effort of the plaintiff is to make the exception take the place of the

general rule. But it must fail. The declarations of the woman as to her sufferings and condition at any particular time are also evidence of her state at the time she made them. It is natural evidence upon those points, as her appearance, seeming agony of body, and other physical exhibitions would be: *Roulhac v. White*, 9 Ired. L. 63; *Biles v. Holmes*, 11 Id. 16. The ground of receiving those declarations is, that they are reasonable and natural evidence of the true situation and feelings of the person for the time being. But in reference to the past periods, they have no such claim to confidence, as they are manifestly to that purpose but the narrative of one not on oath. The physicians might probably give their opinion, and did give it, how long she had been infected with this malady, because their opinion would be founded on the known progress of the disease to its different stages at various periods, and the appearance of the patient during the course of their attendance. But the account given by her, as to previous symptoms and their origin and duration, would not influence the mind of the physician upon the question as one of science, but would be acted on by him only in proportion to the belief of its truth, either from his confidence in the narrator or from its coincidence with his judgment on that point, formed from the existing stage of the malady.

The narration, therefore, was clearly improper to be submitted to the jury, as tending to establish that her condition, at the time to which the narrative refers, was in fact such as she subsequently described it. Though extremely slight evidence that the woman had not contracted her disease before the sale, and did so afterwards, yet it was evidence having that tendency, that the disease was not known by the practitioners of medicine in the part of the country where she was sold to have existed there about that period; and was known by the gentlemen of the same profession to have existed about the place to which she was carried. From the nature of the malady, and the usual mode of contracting it, and the physical propensities and common moral feelings and habits of persons in the condition of this woman, the evidence afforded some aid to the jury in establishing the probable period when she became infected.

Judgment affirmed.

OPINION OF WITNESS not skilled in that upon which his opinion is asked is not admissible: *Bell v. Morrisett*, 6 Jones L. 178, citing the principal case. The decisions in this series upon the subject of opinions of witnesses as evidence are gathered and classified in the note to *Jefferson Ins. Co. v. Colheal*.

22 Am. Dec. 574; and see also references in note to *Donnell v. Jones*, 48 Id. 73; *Fish v. Dodge*, 47 Id. 254, and note.

DECLARATIONS OF DECEASED as to his condition and feelings prior to his death are admissible: *State v. Harris*, 63 N. C. 1, 8, citing the principal case.

DYING DECLARATIONS: See references in note to *McDaniel v. State*, 47 Am. Dec. 101.

ROOKS v. MOORE.

[BUNKE's LAW, 1.]

TURPENTINE TREES MAY BE LEASED.

LEASE OF TURPENTINE TREES IS CREATED by a contract by which the owner agrees that another person may cultivate them, and dip the trees, and have the boxes for a year, and the latter agrees to pay to the owner one fourth of the turpentine.

To MAINTAIN TROVER BETWEEN CO-TENANTS, it is necessary to show a destruction of the property, or some act tantamount to a destruction, and the action will not lie by one co-tenant for a mere conversion by a defendant claiming under the other co-tenant.

TROVER for eight barrels of turpentine. Plaintiff, being the owner of certain turpentine trees, entered into an agreement by which one Black was to cultivate them for a year, pay the plaintiff one quarter of the turpentine made, and apply the residue on debts owed plaintiff by Black. The material part of the agreement is stated in the opinion. The turpentine for which this action was brought was made by Black from the trees, and was seized on execution against Black in favor of the defendant, and converted by him. The plaintiff claimed that Black was a mere laborer for him; but the court instructed the jury that the agreement was a case of renting, and that none of the property belonged to the plaintiff until after a division, and that Black's undertaking to make a certain application of the proceeds made no difference. Verdict for defendant; the plaintiff appealed from a rule discharging a new trial.

J. H. Bryan, for the plaintiff.

No counsel, contra.

By Court, PEARSON, J. If Black was a hireling, whose wages were to be paid by an allowance of a certain part of the turpentine made by him, then the whole of the turpentine belonged to the plaintiff until he delivered over to Black his share as wages.

If Black was a lessee of the trees for one year, and by way of rent was to deliver to the plaintiff one fourth of the turpen-

tine made, then the whole belonged to Black until he delivered over to the plaintiff his share as rent.

The case states that the "plaintiff agreed with Black that he might cultivate the trees, and dip the turpentine, and have the boxes for a year; and Black promised to pay him therefor one fourth of the turpentine." This is clearly a lease for one year, provided turpentine trees can be leased. That is the question in the case.

The authorities cited in Bac. Abr., tit. Leases and Terms for Years, leave no doubt on this question. So under title Ejectment, it is said ejectment lies *pro prima tonsura*; that is, if a man has a grant of the first grass that grows on the land every year, he may recover in ejectment; for the first grass, or *prima tonsura*, is the best profit, and therefore, he that hath it shall be esteemed the proprietor of the land itself—for the after grass or feeding is in the nature of commonage. So ejectment lies *pro herbagia*, because the herbage is the most signal profit of the soil, and the grantee hath a right at all times to enter and take it. But ejectment does not lie *de pannagio*, "because this is only the masts that fall from trees, which the swine feed on, and not part of the soil, as the herbage is." These positions are settled by many cases there cited.

It may be that the privilege of picking up pine knots, to be burned into tar, has the same relation to the right of cultivating the trees for turpentine that *pannagio*, or the privilege of taking the mast that falls, has to the right to take the herbage. However this may be, it is clear that the right to cultivate the trees for turpentine is the "most signal and best part of the land" fit for that purpose, and consequently, he that hath it is esteemed the proprietor of the land for the time necessary to cultivate and take it away; and the right to bring ejectment implies that it is the subject of lease.

It was said by Mr. Bryan that the plaintiff and Black were tenants in common. We did not clearly see the ground upon which he took this position; but even if it were so, the plaintiff can not maintain trover; for to maintain that action between tenants in common, it is necessary to show a destruction of the property, or some act tantamount to a destruction. Here there was a mere conversion by the defendant claiming under Black.

Judgment affirmed.

LEASING TURPENTINE TREES, and the nature of such an act, as explained in the principal case, is recognized as a valid contract, distinguishable from "cropping," in *Denton v. Strickland*, 3 Jones L. 61.

CULTIVATING LANDS ON SHARES: See subject treated of in the note to *Putnam v. Wile*, 37 Am. Dec. 317.

TROVER BY ONE CO-TENANT AGAINST ANOTHER.—The doctrine of *Rooks v. Moore* is applied in *Powell v. Hill*, 64 N. C. 169, 171. See reference to decisions and notes in this series on this question: *Nowlen v. Colt*, 41 Am. Dec. 756; *Agnew v. Johnson*, 55 Id. 565; *Perminiter v. Kelly*, 54 Id. 177, and cases cited in the note.

WINSTEAD v. REID.

[BUCKEE'S LAW, 76.]

ACTION FOR BREACH OF SPECIAL CONTRACT must, in general, be on the special contract while it is open and unperformed; and no action of *assumpsit* for anything done under it can be brought.

PLAINTIFF CAN NOT RECOVER ON QUANTUM MERUIT WHERE CONTRACT WAS ENTIRE and executory, and after performing a part he willfully, and without just excuse, and against the will of the defendant, refused to go on with it.

CONTRACT BEING ENTIRE, PERFORMANCE BY PLAINTIFF IS CONDITION PRECEDENT to his recovery; and it must be averred in his declaration and proved, unless the opposite party has discharged him from executing it, either by refusing to let him go on with it, or by disabling himself from performing his part; and if the plaintiff fails to aver performance, or a readiness to do so, he can recover neither on the special contract nor on a *quantum meruit*.

ASSUMPSIT for work and labor done. Plea, the general issue. The plaintiff had agreed to build certain specified additions to the defendant's dwelling for two hundred dollars, and without any fault of the defendant, voluntarily and willfully abandoned the work when it was half completed, and refused to finish it according to the contract, although often requested to do so. The plaintiff's counsel prayed the court to charge the jury that the plaintiff was entitled to recover the value of the work actually performed, notwithstanding the special contract; but the court instructed that the plaintiff was not entitled to recover. Verdict for the defendant. Plaintiff appealed.

No counsel for plaintiff.

Lanier and Norwood, contra.

By Court, NASH, C. J. In respect to actions on contracts, the rule is, that where a special contract is made, the action for its breach must in general be on the special contract, while it is open and unperformed; and no action of *indebitatus assumpsit* for anything done under it can be brought. The plaintiff in this case undertook to do certain work for the defendant for a

specified sum of money, and after the work was half accomplished, abandoned it and refused to go on with or complete it. The special contract was still open, for the defendant requested the plaintiff to finish his work. The action is upon the *quantum meruit*: the plaintiff merits nothing, and the law will give him nothing. The contract was an entire one and executory, and after performing a part, he willfully and without a just excuse, and against the will of the defendant, refused to go on with it. The contract being an entire one, performance by the plaintiff was a condition precedent, which must be averred in the declaration, in which case it must be proved, unless the opposite party has discharged him from executing it, either by refusing to let him go on with it, or by disabling himself from performing his part. If the plaintiff does not aver performance on his part, or a readiness to do so, he can recover neither on the special contract nor on a *quantum meruit*. To this point *Culler v. Powell*, 6 T. R. 320, is a leading and strong case. There a sailor hired for a voyage from Kingston to Liverpool for a stipulated price, "provided he proceeded, continued, and did his duty" on board the ship until his arrival at Liverpool. He died on the voyage. The court held that wages could not be recovered, either on the contract or on a *quantum meruit*; that the performance of the voyage was a condition precedent, which must be performed before anything could be claimed by the sailor. A stronger case, and one more forcibly illustrating the principle, can not well be conceived. See the able note to the second volume of Smith's Leading Cases, p. 13, where all the English and American cases are collected and digested. In the note, the American cases are arranged, and the principles to be extracted from them stated. The fifth division is, if there has been an entire executory contract, and the plaintiff has performed a part of it, and then willfully refuses, without legal excuse, and against the defendant's consent, to perform the rest, he can recover nothing on the special or general *assumpsit*. See twenty-fifth page of same volume of Smith. In the case of *Jennings v. Camp*, 13 Johns. 97 [7 Am. Dec. 367], the same doctrine is stated by Justice Spencer in declaring the opinion of the court. See also *Carter v. McNeely*, 1 Ired. L. 448, and *Festerman v. Parker*, 10 Id. 474. His honor, the presiding judge, committed no error in refusing the instructions prayed.

Judgment affirmed.

PART PERFORMANCE OF ENTIRE CONTRACT ENTITLES TO NO RECOVERY--a proposition quoted with approval in *Pullen v. Green*, 75 N. C. 215; *Russell v*

Stewart, 64 Id. 487; *Niblett v. Herring*, 4 Jones L. 262; *Brewer v. Tysor*, 3 Id. 180; and in *White v. Brown*, 2 Id. 403. The subject of apportionment of contracts is discussed in the note to *Cuthbert v. Kuhn*, 31 Am. Dec. 518 et seq., and *McGehee v. Hill*, 29 Id. 277; and *Helm v. Wilson*, 28 Id. 336, contains references to other considerations in this series of the question of part performance of entire contracts. See also the note to *McKinney v. Springer*, 54 Id. 480.

HARRISON v. PENDER.

[*Burnett's Law*, 78.]

JUDGMENT IN ATTACHMENT SUIT CAN NOT BE COLLATERALLY IMPEACHED by showing that the plaintiff at the time of the issuing of the attachment was not a creditor of the defendants.

JUDGMENT IN ATTACHMENT IS PLACED ON SAME FOOTING WITH ONE RENDERED IN COURT OF RECORD, according to the course of the common law. It can not be collaterally impeached by evidence or by plea, except by a plea denying the existence of the record, and is conclusive until set aside by the same court, or reversed by a writ of error or on appeal by a superior tribunal.

Plaintiffs and defendant were both attachment creditors of one Rhodes, an absconding debtor. The defendant's attachment issued a day previous to the plaintiffs'. Judgments were obtained by both parties, executions were issued, and the sheriff brought the proceeds into court and asked the advice of the court as to the disposition of the proceeds. The plaintiffs served a rule on defendant to show cause why the money should not be applied to their execution, and in support of the rule offered evidence to show that the defendant was not a creditor of Rhodes at the time this attachment issued. The court rejected the evidence and discharged the rule; the plaintiffs appealed.

E. W. Jones, for the plaintiffs.

Heath, contra.

By Court, BATTLE, J. The effect of the testimony offered by the plaintiffs in the rule was to impeach the validity of the judgment obtained by the defendant Pender in his attachment against Rhodes, by showing that when he issued it he was not a creditor of Rhodes. This could not be done collaterally, as has been often decided; and his honor was, therefore, fully justified in rejecting the testimony. In the case of *Skinner v. Moore*, 2 Dev. & B. L. 138 [30 Am. Dec. 155], one of the points adjudged was, that by our attachment law a judgment obtained upon a proceeding in an original attachment is placed upon the same footing with a judgment rendered in a court of record,

according to the course of the common law. It can not be collateralily impeached by evidence or by plea, except by a plea denying the existence of the record; and is conclusive until it be set aside by the same court, or reversed upon a writ of error or on appeal by a superior tribunal. That case is decisive of this; and in it the reasons upon which the principle is established are so fully and ably explained by the late Chief Justice Ruffin as to render superfluous any further comment. The judgment is affirmed.

Judgment affirmed.

COLLATERAL ATTACKS UPON JUDGMENTS: See *Cochran v. Van Suryay*, 32 Am. Dec. 588, note; *Tarbox v. Hays*, 31 Id. 481, in note; *Starbuck v. Murray*, 21 Id. 180; *Dufour v. Camfranc*, 13 Id. 365, note.

CONCLUSIVENESS OF JUDGMENTS: See note to *Doty v. Brown*, 53 Am. Dec. 355.

SMITH v. SHARPE.

[BUBEE'S LAW, 91.]

WASTE IS DEFINED TO BE SPOIL or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that has the remainder or reversion in fee simple; whatever is done which tends to the destruction of the inheritance or the impairing of its value is waste.

TENANT IN COMMON CAN MAINTAIN ACTION ON CASE AGAINST CO-TENANT whenever a permanent injury is done to the freehold by his co-tenant, in which his damages shall be measured by the injuries actually sustained.

ONE TENANT IN COMMON CAN NOT MAINTAIN ACTION OF WASTE against the other, where the act complained of instead of injuring the common estate has improved it.

TENANT IN COMMON CAN NOT BE MADE TO ACCOUNT for the value of marl dug and carried away by him, in an action of waste by his co-tenant for digging and carrying it away.

ACTION ON THE CASE. The opinion states the case.

Bragg, for the plaintiff.

Smith, contra.

By Court, Nash, C. J. · The plaintiff and defendant owned in common a fishery on Chowan river. It consisted of a narrow strip of land, extending from the brow or brink of the hill or bank, which was high, down to the edge of the water. This land was used as a fishery, and was of no value for agricultural purposes. The bank of the river was underlaid with a bed of

valuable marl, a large portion of which the defendant dug and carried away, against the wishes and remonstrances of the plaintiff. The plaintiff has brought this action to recover damages for the alleged waste. His honor below decided that the action could not be sustained, and we concur with him.

It is stated in the case, that as a fishing ground, the land was improved by the digging down of the hill to get at the marl—the facility of getting to the river being thereby increased. There is no question but that one tenant in common can maintain an action on the case in the nature of waste against a co-tenant, when he destroys the thing held in common. This is familiar learning. Was the act complained of waste? We think not. Waste is defined to be a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disinheritson of him that hath the remainder or reversion in fee simple: 2 Bla. Com. 281; and it is said that whatever is done which tends to the destruction of the inheritance, or the impairing of its value, is waste. By the common law only single damages were recoverable for waste; but by the statute of Gloucester, 6 Edw. I., it is provided that the tenant committing the waste "shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance;" and if done *sparsim*, or all over a wood, the whole wood shall be recovered.

The English statutes upon this subject have been adopted by our legislature. Revised statutes, chapter 119, section 4, re-enacts the statute 15 Edw. I., giving the action to a tenant in common. The action intended in this latter section is an action to recover damages for a permanent injury to the property held in common. It could not have been the intention of the legislature to apply the penalties of the statute of Gloucester to injuries to the freehold, committed by a tenant in common; for the third section, which enforces those penalties, and precedes the fourth immediately, is restricted to the tenants specified in the two first sections, to wit, tenant for life or years and guardians. If this were not so, then the whole relation of the parties as tenants in common of the tract would be changed—a partition effected between them by a way, as we think, not contemplated by the legislature—and nothing left to the defendant but the right to fish there, stripped of the privilege of landing the seine on the beach, and there curing his fish, without the consent of the plaintiff; a barren right, and of no value. It was the intention of the legislature to give the action on the case to

one tenant in common, whenever a permanent injury is done to the freehold by his co-tenant, in which his damages shall be measured by the injuries actually sustained; and it is called an action of waste, simply to point out of what nature and kind the injury complained of must be to authorize the action. It is given as an additional remedy to an action of account, which is an unwieldy one, and has grown nearly out of use.

Apply these principles to the case before us: the plaintiff and defendant are tenants in common of a piscary or fishery; the strip of ground running along the river is necessary to the enjoyment of the right of fishing there—necessary to enable them to land their fish and cure them. Has the defendant done anything to injure the fishery? On the contrary, the act complained of has improved it. It has rendered the approach of the fishery more convenient; and enables the proprietors more readily to take off the proceeds of their labor. But it is said that though this be the fact, yet the value of the land was diminished, if not destroyed, by the removal of the marl. With respect to tenancy in common of a chattel, the rule is, if it is destroyed, misused, or spoiled by the co-tenant, an action lies for the other: 1 Ch. Pl. 91. But one tenant in common may convert the chattel to its general and profitable use, although it change the form of the substance, without subjecting him to an action by the other: *Fennings v. Lord Grenville*, 1 Taunt. 241. Now apply this principle to these tenants in common of the realty. There is no remainderman or reversioner to be injured, or to bring any action—the whole property in fee simple being in the plaintiff and defendant; the marl lying in the earth is valuable to no one: can it be that the plaintiff, through obstinacy, or any other cause, can deprive the defendant of all benefit to be claimed from it? Or, that by converting the property to its general and profitable use, he commits a wrong to his co-tenant, and subjects himself to an action of waste? Suppose A. and B. are tenants in common of a tract of land which is in woods—can neither of them, without the consent of the other, clear a portion of the land, and put it in cultivation, without becoming a tort-feasor? In the case we are considering, we hold that the plaintiff can not maintain the action, because as a fishery the land is neither injured in value nor destroyed, but improved. For the value of the marl removed by the defendant he is no doubt bound to account to the plaintiff, but not in this action.

Judgment affirmed.

WASTE, ACTION ON CASE IN NATURE OF, WILL NOT LIE BETWEEN TENANTS IN COMMON: 7 Jones. L. 210, citing the principal case. And as to co-tenant's liability for waste, see *Hancock v. Day*, 36 Am. Dec. 293.

JOHN SATTERWHITE v. HICKS.

[BUABEE'S LAW, 105.]

DECLARATION OF VENDOR OF PERSONAL PROPERTY MADE WHILE HOLDING IT is evidence against those claiming under him.

TO SHOW THAT SALE WAS WITHOUT CONSIDERATION AND FRAUDULENT as to creditors, evidence of the declarations of the vendor while in possession of the property that he was not much indebted is admissible, when the consideration of the sale was a debt alleged to be owing from the vendor to the vendee.

PARTY ALLEGING FRAUD MUST PROVE IT, AS GENERAL RULE; but this rule does not extend to a case where the vendor was indebted beyond his power to pay, and a writ had issued against him to recover a debt due from him, and he then sells to his brother-in-law the personality claimed to be fraudulently conveyed, and to sustain the sale, alleges he was smartly indebted to the vendee, and produces unattested bonds bearing different dates, executed by him to the vendee.

IF THERE IS NO EVIDENCE OFFERED UPON POINT ARISING ON TRIAL of a cause which it is important to either party to sustain, it is not only no error in the judge to inform the jury that there is no evidence upon the point, but it is his duty to do so.

DETINUE for two slaves, conveyed by Joseph Satterwhite to the plaintiff, his brother-in-law, for an alleged valuable consideration. Thomas Satterwhite, another brother-in-law, attested the deed, and testified that the plaintiff sent for him, that he went to plaintiff's house and found Joseph there, and that the latter said he was smartly indebted to John, and was about to sell him the negroes in dispute; that after the execution of the deed the plaintiff proposed to have a settlement with Joseph, and went to his desk and took out some papers and asked Joseph if he had the paper he had given him some time back, and on the latter's answering that it was at home, John proposed to go to Joseph's house and make a settlement, and asked witness to go, but he did not. The plaintiff then produced in evidence four bonds executed by Joseph to him at different times, the consideration of which amounted to more than the value of the slaves. Joseph Satterwhite was indebted largely beyond his means at the time of the conveyance, and a writ had issued against him on one of his debts, on which judgment was obtained, execution issued, under which the slaves in question were levied on and sold to the defendant. The defendant

alleges that the conveyance was made in fraud of creditors, that Joseph's indebtedness to the plaintiff was very small, if anything, and that the bonds were without consideration. The defendant, against the plaintiff's objection, introduced evidence showing that Joseph had said before the conveyance was made that he was not embarrassed, and did not owe but a small sum. The plaintiff's counsel prayed the court to charge that proof of the execution of the bill of sale, and that the parties said it was in consideration of Joseph's indebtedness to the plaintiff and proof of the execution of the bonds made out a *prima facie* case for the plaintiff, and cast the burden of proof on the defendant. This instruction was refused, and the court charged that as the parties to the conveyance were brothers-in-law, and that as bonds were without subscribing witnesses, and their existence unknown to any one but the parties until they were produced at the first trial of this cause, that something more than production and proof of the bonds was necessary to make out a *prima facie* valuable consideration as against a purchaser at an execution sale of the slaves. The court further charged that if the jury believed the transaction was *bona fide* they should find for the plaintiff, otherwise for the defendant. Verdict for defendant. A rule for a new trial being discharged, the plaintiff appealed.

Miller, for the plaintiff.

Lanier, J. H. Bryan, and Gilliam, contra.

By Court, NASH, C. J. The first objection raised in the plaintiff's bill of exceptions is to the reception of the ante-declarations of Joseph Satterwhite. His honor committed no error in this particular. It is a general principle in the law of evidence, that any fact to be proved against a party ought to be proved in his presence, by the testimony of witnesses, duly sworn or qualified to tell the truth. Hearsay, therefore, is not admitted in our courts of justice, because it is but a statement which a witness gives of what he professes to have heard a third person say. This rule is as old as the common law. To it, however, there are exceptions coeval with it: such, for instance, of dying declarations, pedigree, and others, stated by writers on the law of evidence. Among the more modern exceptions, is that class of hearsay admissible upon the sole ground that it proceeds from the persons owning the property at the time, and would be evidence against him if he were a party to the suit. His estate or interest in the property, coming to an-

other by any kind of transfer, the successor is said to claim under the former owner, and whatever he may have said concerning his own rights while owner is evidence against his successor: 1 Phill. Ev., pt. 1, p. 644, note. This rule applies equally to real and personal property, whether in possession or in action. Thus, the admissions or declarations of a vendor or holder of personal property, made while so holding it, is evidence of all claiming under him, either mediately or immediately. In *detinue* for slaves, the declarations of the defendant's vendor, made before the sale, were held admissible: *Wallhol v. Johnson*, 2 Call, 275. In *Johnson v. Patterson*, 2 Hawks, 183 [11 Am. Dec. 756], the declarations of a vendor before the sale were admitted. In *Guy v. Hall*, 3 Murph. 150, the principle is very elaborately discussed. "In this case," the judge remarks, "they are offered (that is, the declarations) as coming from a privy in estate, and therefore in law, as coming from the party himself." This rule extends to choses in action. The admissions or declarations of the assignor of a chose in action, made while he is the holder, are evidence against the assignee, and all persons claiming under him. In *Haddan v. Mills*, 4 Car. & Pul. 486, it appeared that one Rigby had indorsed the bill to Mills when overdue, and it was proposed to give in evidence Rigby's declarations while the owner, to show the want of consideration. On the part of the defendant it was objected to. Chief Justice Tindal admitted it, observing: "You derive title under this party, and what he said is evidence against you." To the same effect is the opinion of the court in *May v. Gentry*, 4 Dev. & B. L. 117. They declare that if the declarations could be received against the persons making them, they are competent against the person who claimed under him by a contemporaneous or subsequent conveyance. Here the evidence, slight to be sure, but still evidence, was offered to show that Joseph Satterwhite was not indebted to the plaintiff; or, if so, in but a small amount; and the bonds given in evidence were without consideration, and fraudulent against the creditors. The declarations were properly received.

The second exception is the refusal of the judge to charge, as required by the plaintiff. It is true that in ordinary cases he who alleges fraud must prove it. The burden does lie upon him, but it does not extend to such a case as this—where, by the statement as made by the plaintiff, fraud attaches to the transaction. Both Joseph and John Satterwhite and the subscribing witness were brothers-in-law; Joseph was indebted beyond his

power to pay; a writ had issued against him to recover a debt due from him. Under these circumstances, he sells, or pretends to sell, to the plaintiff the slaves in dispute, and in order to sustain the sale, alleges he was smartly indebted to him, and produces four several bonds bearing different dates, one in 1843, one in 1845, one in 1847, and one in 1848, amounting in the whole to upwards of one thousand four hundred dollars. The bonds are not attested by any witness. In the case of *Hawkins v. Alston*, 4 Ired. Eq. 137, the chief justice, in delivering the opinion of the court, observes: "It is but an act of common precaution, which any man owes to his own character, when a bond is executed between brothers for so large a sum, under such circumstances, and upon a settlement, as alleged for previous dealings running through several years, that the parties should come to their settlement in the presence of disinterested third persons, etc., so as to afford to other creditors the opportunity of investigating," etc. In another part of the same case the court say that in such a transaction between near relations, "it is to be expected that they should offer something more than the naked bond of the one to the other, as evidence of the alleged indebtedness." See also *Black v. Wright*, 9 Ired. L. 449; 3 Stark. Ev. 487. His honor, therefore, committed no error in refusing to charge as required. It was the plaintiff's duty to remove the cloud under which his case rested.

The remaining exception is that, in his charge, his honor intimated to the jury an opinion upon a matter of fact. We are informed that this objection is founded on that part of the charge in which the judge uses this language: "And the bonds without a subscribing witness, and their existence unknown to any one (but the parties) until they were produced on the first trial of this cause." It is objected, that the judge violated the act of assembly in stating that the existence of the bonds was unknown until produced on the trial. It is manifest that his honor spoke of the case as it appeared before him. Now there was no evidence that the bonds were ever seen until produced in evidence on the trial of the cause. The expressions used, then, were tantamount to telling the jury that there was no evidence of the fact of their ever having been seen until the trial. Whenever a point arises on the trial of a cause, which it is important to either party to sustain, and there is no evidence offered upon it, it is not only no error in the judge so to inform the jury, but it is his duty. Situated as the case was, it was very important to the plaintiff to prove that there was a settle-

ment, and that these bonds had an existence before it took place. No settlement was proved—the fact that after the deed was executed the plaintiff went to his desk and took out some paper or papers was no evidence that the bonds were the papers. If they were, why were they not exhibited? The fraud attempted is too palpable, and not reconcilable with any pretense of fairness.

We concur with his honor on all the points ruled by him.
Judgment affirmed.

FRAUDULENT CONVEYANCES, the *bona fides* is a question for the jury: *McCullock v. Doak*, 68 N. C. 267, 273; *Reiger v. Davis*, 67 Id. 185, relying on *Satterwhite v. Hicks*. As to what persons are *bona fide* purchasers, see note to *Hoffman v. Noble*, 39 Am. Dec. 716; *Padgett v. Lawrence*, 40 Id. 240.

FRAUDULENT SALE, WHEN MAY BE AVOIDED, AND BY WHOM: See note to *Thurston v. Blanchard*, 33 Am. Dec. 702.

SELLER'S DECLARATIONS WHILE IN POSSESSION admissible against vendee: *McCasless v. Reynolds*, 67 N. C. 268, quoting from the principal case. And see the references in the note to *Padgett v. Lawrence*, 40 Am. Dec. 240.

ONE STANDING IN CONFIDENTIAL RELATION to his vendor has the burden of proving fairness of the conveyance: *Barnawell v. Threadgill*, 3 Jones Eq. 50, citing the principal case.

SAUNDERS v. HAUGHTON.

[*8 IREDELL'S EQUITY*, 217.]

TENANT FOR LIFE OF PERSONALTY IS ENTITLED TO INCREMENT made during the course of the tenancy, as a compensation for the trouble and expense of taking care of the original stock.

EXECUTOR IS APPOINTED TO TAKE CARE OF INTEREST OF ALL CONCERNED, and is as much bound to see that the remainderman is not deprived of his interest as that the tenant for life shall enjoy his.

IN ESTATE FOR LIFE WITH REMAINDER OVER IS GIVEN IN PROPERTY CONSUMED IN USE, it is the duty of the executor to sell the property, and to pay over the interest to the tenant for life; but if the executor consents to the legacy, and the property remains in the hands of the life tenant, and an increase takes place while in the possession of the tenant for life, it belongs to him, and the remainderman is only entitled to what remains of the original stock.

BILL for a division of slaves, and for an accounting. The opinion states the case.

William J. Baker, for the plaintiff.

Heath, contra.

By Court, **NASH, J.** Job Pettijohn died in 1824, and by his will devised as follows: "I lend to my wife, Elizabeth Petti-

john, the use of all my negroes and personal estate of every kind, during her natural life." He then provides, that if his wife remains a widow, the whole of his estate to remain in joint stock, to her use, during her natural life, and at her death to be divided equally among her six daughters; to wit, Frances, Sarah, Elizabeth, Rachel, Mary Ann, and Rosanna. To this will, the widow and his three daughters, Frances, Sarah, and Elizabeth, were appointed executrices, and qualified as such. The widow took into her possession all the property bequeathed to her, and died in the year. Rosanna, one of the legatees in remainder, intermarried with the plaintiff Benjamin Saunders, and died in the life-time of the widow, and her husband was duly appointed her administrator. The bill is filed for a division of the slaves of the estate, and an account of their hires since the death of the widow, Elizabeth Pettijohn; and also for an account of the perishable property which came to the hands of the executrices, under the will. An order of reference to the clerk and master was made to state the account. His report was returned, and excepted to by the defendants.

The first exception is, that the master has charged against the defendants three hundred and fifty dollars, the present value of fifty head of cattle and fifty hogs, which, from the evidence, were the offspring of the original stock, which went into the possession of the widow, as tenant for life, twenty-four years ago.

The second and third exceptions are but corollaries from the first.

It is true, as a general proposition, that a tenant for life of personal property is entitled to the increment made during the course of the tenancy, as a compensation for the trouble and expense of taking care of the original stock. And the executor, so far as the legatees are concerned, has discharged his duty when he assents to the legacy. The rule does not, in this state, extend to slaves; and when the property is of such a nature as to be consumed in the use, *quo ipso usu consumitur*, a different rule of duty devolves upon the executor. In such a case the tenant for life being entitled only to the use, if it be entirely consumed, the remainderman loses altogether the benefit of the bequest. The executor is appointed to take care of the interest of all concerned, and is as much bound to see that the remainderman is not deprived of his interest as that the tenant for life shall enjoy his. It is now well settled that when a residue is given for life of such property, with remainder over, it is

the duty of the executor to sell it and pay over the interest to the tenant for life: *Smith v. Barham*, 2 Dev. Eq. 425 [25 Am. Dec. 721]; *Jones v. Simmons*, 7 Ired. Eq. 178. If, however, the executor assents to the legacy, and the property remains in the hands of the tenant for life, and it be of such a nature as to be consumed in the using, such as cattle, horses, or hogs, and an increase from them takes place while in the possession of the tenant for life, it belongs to him, and the remainderman is only entitled to what remains of the original stock. From the case before us, the cattle and hogs, valued by the master in his report, were the property of the widow. The master, then, has taken into his account property which never was of the estate of the testator. It was the original stock he was directed to take an account of.

This exception is allowed, and the report set aside as to the two items excepted to. In all things else it is confirmed.

Decree accordingly.

RIGHTS OF LIFE TENANT IN PERSONALTY: See the note to *Braswell v. Morehead, post*, p. 586.

GARNER v. GARNER.

(BUSEBECK'S EQUITY, 1.)

HUSBAND MAY MAKE GIFTS OR PRESENTS TO HIS WIFE, which will be supported in equity against himself and his representatives.

IMPERFECT DEED OF SLAVES BY HUSBAND TO WIFE will be enforced, after his death, against his children and his executor, where he had already made advancements to his children, when from the time of the deed until the grantor's death, and for a long time subsequently, the wife had been in undisturbed possession of the slaves, and the executor of the grantor will be regarded as the trustee for the wife.

MARY GARNER, the plaintiff, was the wife of the intestate, John Garner. After the marriage he made advancements to his children by a former marriage, and at the request of the plaintiff to make provision for herself and for their children, he executed an instrument by which he gave to one Moody, in trust, certain property for the plaintiff and the children of the marriage, and provided for the plaintiff in these words: "I give unto my wife, Mary Garner, all the right, title, and interest of the negroes belonging to her before I married her, to wit," etc. The object of the deed was to give her the separate and exclusive right to the slaves, and from the date of the deed to the death of the

husband, and for a number of years afterwards, the slaves were regarded as hers absolutely, and she was in the undisturbed possession of them. The husband having died intestate, the defendant took out letters of administration upon his estate at the end of that time and claimed the slaves. The bill prayed that he be restrained, and also be decreed to execute a conveyance of the slaves to the plaintiff.

Bragg, for the plaintiff.

Barnes, contra.

By Court, BATTLE, J. It has been long settled that a husband may, after marriage, make gifts or presents to his wife which will be supported in equity, against himself and his representatives: *Lucas v. Lucas*, 1 Atk. 270; Atherly on Mar. Set. 331. Mr. Adams, in his excellent treatise on the doctrine of equity, classes meritorious or imperfect consideration under the head of "jurisdiction of the courts of equity in cases in which the courts of ordinary jurisdiction can not enforce a right." In discussing the subject, he says, at page 97: "The doctrine of meritorious consideration originates in the distinction between the three classes of consideration on which promises may be based, viz., valuable consideration, the performance of a moral duty, and mere voluntary bounty. The first of these classes alone entitles the promisee to enforce his claim against an unwilling promisor; the third is, for all legal purposes, a mere nullity until actual performance of the promise; the second or intermediate class is termed meritorious, and is confined to the three duties of charity, of payment of creditors, and of maintaining a wife and children.

" Considerations of this imperfect class are not distinguished at law from mere voluntary bounty, but are, to a modified extent, recognized in equity. And the doctrine with respect to them is, that although a promise, made without a valuable consideration, can not be enforced against the promisor, or against any one in whose favor he has altered his intentions, yet if an intended gift or meritorious consideration be imperfectly executed, and if the intention remains unaltered at the death of the donor, there is an equity to enforce it in favor of his intention, against persons claiming by operation of law, without an equally meritorious claim."

The doctrine, thus clearly and explicitly stated, is so directly applicable to this case, that it saves us the necessity of further investigation. The wife was certainly an object of meritorious

consideration; the gift of the slaves, by the deed executed by the husband, was imperfect; the intention of the donor remained unaltered at his death; and the gift is sought to be enforced against persons, to wit, his children, claiming by operation of law, without an equally meritorious claim, because those by a former marriage had been advanced by their father in his life-time, and those by her were provided for in the same deed. The case of *Holloway v. Headington*, 8 Sim. 324; S. C., 11 Con. Eng. Ch. 459, decided by Vice-chancellor Shadwell, to which we are referred by the defendant's counsel, does not militate against this principle. In that case, by a voluntary settlement, a husband and wife assigned all the property to which his wife then was, or which she or her husband in her right might become, entitled to, in trust to the wife for life, for the husband for life, and for the children of the wife living at her death, whether begotten by her then or any future husband. The court refused to give effect to it, because it was vague and unreasonable; and because it might, in a certain contingency, if sustained, give the whole of the wife's fortune, not to her grandchildren by her husband, but to a child of a future husband. In the case before us, on the contrary, the intended settlement is certain and reasonable—a provision made by a husband for his wife after his children had already been provided for. The case of *Huntley v. Huntley*, 8 Ired. Eq. 250, decides that though a deed from a husband to his wife for slaves can not have the effect of vesting a title in her, yet it amounts to a declaration of trust in her favor.

The defendant must be declared a trustee for the plaintiff, and must execute a deed, to be approved by the clerk, by which the legal title of the slaves in controversy, with their increase, if any, shall be conveyed absolutely to her.

Decreed accordingly.

HUSBAND'S GIFTS TO WIFE will be supported in equity against himself or his representatives. The principal case was followed in *Smith v. Smith*, Winst. Eq. 30, on this point; and see same principle, *Parish v. Merritt*, 3 Jones L. 38, deciding a trustee to be necessary to support such a gift.

VALIDITY OF MARRIAGE SETTLEMENTS: See *Satterthwaite v. Emley*, 43 Am. Dec. 618, and note; and see generally, note to *Merrill v. Scott*, 50 Id. 365.

MERITORIOUS CONSIDERATION, RELATIONSHIP WHEN SUFFICIENT AS, IN SUPPORT OF TRANSFER: See *Ex parte McBee*, 63 N. C. 332; *Lamb v. Pigford*, 1 Jones Eq. 195, citing the principal case. See also *Hester v. Williamson*, 44 Am. Dec. 303, and references in the note.

BRASWELL v. MOREHEAD.

(BUNN'S EQUITY, 26.)

PARTICULAR TENANT OF PERSONALTY CAN NOT CARRY IT BEYOND JURISDICTION of the court, on a bequest by a testator of slaves and other personalty to his granddaughter, with the limitation that the property is to go over if she dies before she arrives at the age of twenty-one.

PARTICULAR TENANT IS ENTITLED TO HIRE AND PROFITS of the slaves until the event happens on which they are limited over, on a bequest by a testator to his granddaughter with a limitation that the property is to go over if she die before she attains the age of twenty-one.

JAMES COLE bequeathed to his granddaughter, Elmira Braswell, certain slaves and other personal property, and also certain real property; the will provided that if Elmira died before she attained the age of twenty-one years the property should be divided among the heirs of his two daughters. Elmira and her guardian subsequently removed to Mississippi and filed this bill against Morehead, the executor of Cole, and the legatees in remainder, and praying that a decree authorizing the removal of the personalty to Mississippi, and for an accounting of the hires and profits of the personalty.

Miller, for the plaintiff.

J. T. Morehead, contra.

By Court, BATTLE, J. The only questions presented by the pleadings, upon which the opinion of the court is necessary, are:

1. Whether the plaintiff can, by her guardian, under the sanction of the court, take the slaves and other personal property bequeathed to her by her grandfather, and carry them to the state of Mississippi, where she now resides, notwithstanding the executory devise to her aunts, in the event of her dying under the age of twenty-one years.

2. Whether she is entitled, during the period of her infancy, to the hires of the slaves and interest and profits of the other personal estate bequeathed to her; or are said hires and profits to accumulate for her aunts, in the event provided for?

We think that there is no difficulty in either question. The court certainly would not authorize the particular tenant of a slave, or other personal chattel, to carry such slave or chattel beyond its jurisdiction, against the wishes of the remainderman. Such an act would be in direct opposition to the power which it claims, and in a proper case always exercises, of re-

straining the particular owner from carrying the slave or other chattel out of the state: *Wilcox v. Wilcox*, 1 Ired. Eq. 36; *Brown v. Wilson*, 6 Id. 558. Owners of executory bequests, and other contingent interests, stand in a position, in this respect, similar to vested remaindermen, and have a similar right to the protective jurisdiction of the court: *Brown v. Wilson*, *supra*.

The plaintiff is clearly entitled to the hires and profits of the slaves and other property bequeathed to her, until the event shall happen upon which they are limited over to the aunts. To hold otherwise would be to consult more the interest of the secondary than the primary objects of the testator's bounty. This is entirely inadmissible, and we think the cases cited in *Fearne on Contingent Remainders and Executory Devises*, 554, sec. 16, fully support our opinion.

There must be a reference to take the accounts, and the master must inquire whether the bond on Blake W. Braswell, bequeathed to the plaintiff, was or might by proper diligence have been collected by the defendant Morehead.

Decreed accordingly.

RIGHTS OF LIFE TENANT IN MONEYS AND PERSONAL PROPERTY.—Where personal property or money is bequeathed to one person for life with a remainder over, the tenant for life, in the absence of anything in the will showing a contrary intention on the part of the testator, is entitled to the possession: *Sampson v. Randall*, 72 Me. 109; *Houser v. Ruffner*, 18 W. Va. 244; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Howell v. Howell*, 3 Ired. Eq. 525; *Humbright's Appeal*, 2 Grant Cas. 320; *Harrison v. Foster*, 9 Ala. 955. Thus where a testator left to his wife three thousand dollars of his estate, "for her full use during her life-time," and at her death "desired" the money, if any was left, to go to other parties, the widow is entitled to receive the money without security or condition: *Humbright's Appeal*, *supra*. Formerly the old practice of chancery was to require the tenant for life to give security for the protection of the remainderman; but such security is not now required unless a case of danger is shown: 2 Williams on Ex., 6th Am. ed., 1396; and in some states it is required that the tenant for life sign and deliver to the executor an inventory of them, admitting their receipt and expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder: Id. Courts will invest the equitable tenant for life with the personal possession of the property where it will be beneficial or requisite for its due enjoyment, but they will interfere more reluctantly to take the direction and disposition of the estate out of the hands of trustees when the surrender of the *corpus* might endanger its security, or where the equitable tenant for life is a *feme covert* for whose personal protection it is best that the estate should continue in the possession and under the control of the trustee: *Williamson v. Wilkins*, 14 Ga. 416. And a legatee for life of money is entitled to the possession and control of it, and a court can not interfere in the possession unless in an extreme case of unfitness: *Copeland*

v. Barrow, 72 Me. 206. And during the life of the tenant for life chancery has no power to order the proceeds of the sale of a negro to be invested for the benefit of a lessee in remainder: Stevens v. Gordy, 9 Gill, 405. But where the legatee lived out of the state the executors should require a bond for re-delivery of the property before parting with the possession: Clarke v. Terry, 34 Conn. 176. If it can be gathered from the will that the testator shows an intent that the tenant for life shall possess and enjoy in specie the property, she is entitled to the possession: Golder v. Littlejohn, 30 Wn. 344. And where there is a particular bequest of chattels for life, the lessee is entitled to the possession upon giving an inventory for the benefit of those ultimately entitled: Freeman v. Knight, 2 Ired. Eq. 72. But in the same case it was held that on a pecuniary legacy to one for life the executor could only pay to the legatee the interest on the sum bequeathed. And it has been held that on a bequest for life the tenant was not entitled to the possession, but that the executor should retain it or convert the property into money, and pay the income only to the life tenant: Brannock v. Stocker, 76 Ind. 558; Ritch v. Morris, 78 N. C. 377; Evans v. Iglesias, 6 Gill & J. 171; Clark v. Clark, 8 Paige, 152; Saunderson v. Stearns, 6 Mass. 37.

A gift for life of things which are consumed in their use, if specific, is an absolute gift of the property: 2 Williams on Ex. 1396; Majore v. Herndon, 78 Ky. 123; but on a residuary bequest of personality, the life tenant is not entitled to the possession, but it is the duty of the executor to sell it, invest the fund arising therefrom, and pay over the income to the life tenant: 2 Williams on Ex. 1396; Covenhoven v. Shuler, 2 Paige, 122; Woods v. Sullivan, 1 Swan, 507. But if the will indicates the intent of the testator to be that the person having the particular estate shall enjoy the property in specie, no sale of it by the executor is to be made: Woods v. Sullivan, *supra*; and in such a case the court has no power to control the disposition by the testator by denying the use to the first taker, which has been bestowed by the will: Swain v. Spruill, 4 Jones Eq. 364; such a bequest gives the right to consume such of the property as can not be used without being consumed: Deighmiller's Estate, 1 Pa. Leg. Gaz. Rep. 499; German v. German, 27 Pa. St. 116. It was held, however, in Patterson v. Devlin, McMull. Eq. 459, that a tenant for life must account to the remainderman for things consumed in their use, and for things necessarily wearing out in their use.

A tenant for life may dispose of the property in any manner, provided he does not injure or endanger the remainder: King v. Sharp, 6 Humph. 55; Vaden v. Vaden, 1 Head, 444. If it is a fund, and he invests it in other property, the property vests absolutely in him, and the remainderman has no right or interest in the property except as a security for the fund: Vaden v. Vaden, *supra*. This principle was applied in White v. White, 1 Ired. Eq. 441, where a husband bequeathed one thousand dollars to his wife for life, and after her death to her children, and she invested the money in negroes, which greatly increased in value. And in Sutphen v. Ellis, 35 Mich. 446, Cooley, J., held that a tenant for life of securities had authority to convert them into money when that was the proper proceeding in order to obtain the income and protect the property from loss, and that even the sale of a particular security might be entirely admissible where the bulk of the estate was preserved intact; all that can be required is that the estate shall be so managed as to preserve the aggregate from diminution. He said: "Where a life estate exists in personal property, there must always be a power to make it available according to circumstances. If the estate consists in money, there must be authority to invest it, and to collect and dis-

charge the securities for the purposes of reinvestment. If it consists of securities in the first place, the authority to convert them into money, when that is the proper proceeding in order to obtain the income and protect the property from loss, is equally undoubted." And where a testator, after giving specific legacies to his children, gave the use of certain negroes to his wife for life, and she sold one of them for the support of her family, it was held that equity would validate the sale under such circumstances, upon the ground that the bequest to her use meant to the use of herself and her children, or in other words, for their support: *Jones v. Jones*, 2 Hayw. 128. And a holder of life estate in slaves may rightfully surrender such estate to one of two tenants in common: *Bowling v. Bowling*, 6 B. Mon. 31.

. Any appreciation in the value of the capital is to be regarded as principal, but all interest, income, or proceeds, however extraordinary or unusual, belong to the tenant for life: *Scovel v. Roosevelt*, 5 Redf. 121; thus dividends from stock and interest arising from money become absolutely the property of the taker of the life estate: *Hall v. Robinson*, 3 Jones Eq. 348; such dividends, whether in cash or bonds or certificates of indebtedness, are not an increase of the stock and are not an accumulation of the *corpus*; nor is this affected by the fact that no dividends are declared for some time, and that when they are, the amount is unusually large: *Miller v. Guerrard*, 67 Ga. 284; S. C., 44 Am. Rep. 720; and bonuses declared on stock are income, and not principal, and belong to the life tenant: *Dale v. Haynes*, 40 L. J. Ch. 244; and profits of the life estate go to the representatives of the life tenant on his death, although there is a provision in the will creating the life estate that the increase of the property should be kept and finally sold, there being a clear intent that the life tenant should have the profits: *Tatum v. McLellan*, 56 Miss. 352; and where a testator possessing shares in several ships bequeathed his personal estate to trustees upon a trust to sell and convert the property and to pay the income to the testator's wife for life, and the will contained a power for the trustees to postpone the sale and conversion "for so long a time as they may think fit," and a provision that the income from the unconverted personality should be paid and applied in the same manner as the income of the money produced by such income, the profits from the voyages made by the ships before their sale will belong to the life tenant: *Lean v. Lean*, 32 L. T., N. S., 305; and where the tenant to whom the dividends of bank stock were given for life, payable half-yearly as received from the bank, died a few days before the semi-annual dividend was declared, the dividend will be apportioned between his representatives and the remainderman: *Ex parte Rulledge*, 1 Harp. Eq. 65; but profits on the sale of the stock do not belong to the life tenant as income, but must be added to the principal: *Whitney v. Phoenix*, 4 Redf. 180. The tenant for life is entitled to the income of the fund from the testator's death: *Sargent v. Sargent*, 103 Mass. 297; *Ayer v. Ayer*, 128 Id. 575; *Harrison v. Henderson*, 7 Heisk, 315; and where the gift of a residuum is made for life, without any direction to invest it, the tenant for life is entitled to the income from the testator's death on such investments as were then made, together with interest on the amount not invested, valued at the time of the testator's death: *Lawrence v. Embree*, 3 Bradf. 364. The commissions for collecting and paying the interest must be paid out of the income, and are not chargeable to the principal: *Danly v. Cummins*, 31 N. J. Eq. 208; and the taxes and expenses of the trust are likewise chargeable to the income: *Whitson v. Whitson*, 53 N. Y. 477.

On a bequest of live-stock or other property in which there is a natural increase, the increase of the stock belongs to the tenant for life, and not to the

remainderman: *Lewis v. Davis*, 3 Mo. 133; *Cragg v. Riggs*, 5 Redf. 82; *Pindexter v. Blackburn*, 1 Ired. Eq. 286; *Majors v. Herndon*, 78 Ky. 123; *Smith v. Barham*, 2 Dev. Eq. 420; S. C., 25 Am. Dec. 721; *Evans v. Iglesias*, 6 Gill & J. 171; *Hunt v. Watkins*, 1 Humph. 498; *Forsey v. Luton*, 2 Head, 183; *Perry v. Terrel*, 1 Dev. & B. Eq. 441; *Horry v. Glover*, Riley's Ch. 53; S. C., 2 Hill Ch. (S. C.) 515; *Saunders v. Haughton*, ante, p. 581. But in *Flowers v. Franklin*, 5 Watts, 265, it was held that on a bequest of stock, amongst other things, for life, that stock which remained at the death of the life tenant went to those in remainder, although it was not the same the life tenant received.

BARNES ET UX. v. WARD.

[BUASER'S EQUITY, 93.]

CONSIDERATION OF RELEASE UNDER SEAL CAN NOT BE DENIED AT LAW.
EQUITY WILL LOOK INTO CONSIDERATION OF RELEASE UNDER SEAL, and if it was obtained by fraud or imposition, or by taking undue advantage of the situation of the party executing it, will either set it aside altogether or restrain the party holding it from making use of it at law.

HUSBAND IS NOT BOUND TO SUPPORT CHILD OF WIFE BY FORMER MARRIAGE; but if he is appointed guardian of the child, he has no legal claim for the maintenance of the child for the time previous to such appointment.

GUARDIAN MAINTAINING WARD CAN NOT EXCEED ANNUAL INCOME OF WARD'S PROPERTY in the state.

INJUNCTION AGAINST PROCEEDINGS IN ANOTHER COURT is an auxiliary writ to restrain parties from proceedings before the ordinary tribunals, where equitable elements are involved in the dispute.

INJUNCTION AGAINST PLEADING AT LAW RELEASE UNDER SEAL will be granted where the release is without consideration and it is contrary to equity and good conscience so to use it.

CONSIDERATION OF RELEASE UNDER SEAL GIVEN BY WARD TO GUARDIAN will be inquired into in a court of equity, and the guardian will be restrained from defending under it in an action at law for an accounting where it was obtained by fraud.

BARNES and his wife, Eliza, commenced an action for an accounting against Ward, the former guardian of Eliza. Ward pleaded a release executed by Barnes and his wife in January, 1843. Barnes and his wife then filed this bill to restrain Ward from pleading this defense on the ground that it was obtained by fraud, and was without consideration, and Meredith Barnes alleged that he was illiterate and unable to read when he signed the paper, and that he signed it after a great deal of importunity on Ward's part. Other facts appear from the opinion.

Strange, for the plaintiffs.

W. Winslow, contra.

By Court, NASH, C. J. The bill is filed to restrain the defendants from pleading, or using at law, a release given by the plaintiff Barnes to the defendant Ward. Ward, after he married the mother of Eliza Barnes, and before his appointment as her guardian, took into his possession a negro woman, the property of his ward. This negro he sold, and the action at law is upon the guardian bond to call him to account; and he has pleaded the release in his defense. The equity of the plaintiffs consists in the alleged fact that the release was given without any consideration. This fact would not avail the plaintiffs at law, because the instrument being under seal, they can not deny in that forum that it was given without consideration—they are estopped to deny it. But a court of equity is not so restrained. They may and will look into the consideration, and if they see that it was obtained by fraud or imposition, or by taking undue advantage of the situation of the party executing it, they will either set it aside altogether, or restrain the party holding it from making use of it at law. The consideration mentioned in the release is five dollars; and the defendant admits no money was paid by him, but alleges that the *feme* plaintiff, his ward, was indebted to him in a sum much beyond the value of the negro; and to sustain his claim he sets forth an account against her amounting to the sum of one thousand two hundred and forty-seven dollars. In April, 1828, the defendant Enoch Ward married the mother of Eliza Barnes, the *feme* plaintiff, and in August, 1835, he was regularly appointed her guardian. The account exhibited by him against her commences with his marriage, and runs down to the time of the marriage of the plaintiffs, in 1842. From 1828 to 1835 the defendant is entitled to nothing for the board and maintenance of the plaintiff Eliza. It was at one time held, under the construction put upon the statute of 43 Eliz., c. 2, and others on the same subject, that where a woman, having children by a former husband, marries a second time, her second husband was bound to maintain the children: *City of Westminster v. Gerrard*, 2 Bulst. 346.

But this doctrine has been overruled, and it is now settled that a husband is not bound to support the children of his wife by a former husband: *Tubb v. Harrison*, 4 T. R. 118; *Cooper v. Martin*, 4 East, 76; *Rex v. Dempson*, 2 Stra. 955. The step-father stands, in that respect, towards his step-child as any other stranger; and if, after the child comes of age, he promises to pay for his maintenance, an action can be maintained,

because the step-father was not bound in law to support him; if he had been, the subsequent promise would have been a *nudum pactum*. The defendant Enoch Ward was, then, under no legal obligation to maintain the plaintiff Eliza, and she was under no legal obligation to serve him. For that portion of the account, then, preceding the appointment of the defendant as the guardian of Eliza, he had no legal claim upon her, as she was under age at the time of her marriage. The answer of Enoch Ward states that Eliza had no property except that negro woman, who was sold by him with her infant for four hundred dollars, which sum was, as he states, a full price. The law of this state does not suffer a guardian, in maintaining his ward, to exceed the annual income of his ward's property: R. S., c. 54, sec. 22. A court of equity, under peculiar circumstances—as where the infant can not be entitled to maintenance as a pauper, and from want of bodily health or strength, or from mental imbecility, can not be bound out as the law directs—may apply a portion of an infant's property to his maintenance, as a matter of necessity: *Long v. Norcom*, 2 Ired. Eq. 354. These remarks are made to show the fraudulent object of the defendant Enoch Ward, and the oppressive use he made of the advantage he possessed, in procuring the release—considerations which could not be looked into in a court of law. The answer states that the plaintiff Eliza knew she was greatly indebted to him. Doubtless his unfounded claim was not unknown to her; and if anything were wanting to show the intention of the defendant, it would be made manifest by the last item in the account, which is one hundred and fifty dollars for a marriage dinner, for a girl who it is stated in the answer had no property, and was a minor. Had the bill asked for an account, we should have ordered one; but the plaintiffs are content to take it in the action at law, and there is no doubt it will be so taken there as to do justice to all parties, and the defendant will receive all just and legal credits, including the pig. An injunction against proceedings in another court is an auxiliary writ to restrain parties from proceedings before the ordinary tribunals, where equitable elements are involved in the dispute. The dissolution of the injunction, upon the coming in of the answer, is a question of discretion to the court, whether on the facts disclosed in the answer, or, as it is technically termed, on the equity confessed, the injunction shall be at once dissolved, or whether it shall be continued to the hearing. Here the object of the injunction is to restrain the defendant from pleading, or availing himself of the release ex-

cuted by the plaintiff Meredith Barnes, on the ground that it is iniquitous, without consideration, and contrary to equity and good conscience so to use it; and the defendant's answer fully satisfies us upon all these particulars, and that the equity of the plaintiff is sufficiently confessed: Adam's Eq. 196; *Minturn v. Seymour*, 4 Johns. Ch. 497.

The cause is before us for final hearing, and the injunction must be made perpetual.

Decreed accordingly.

HUSBAND NOT LIABLE FOR STEP-CHILD'S SUPPORT: *Gay v. Ballou*, 21 Am. Dec. 158, and note. And see the rights and liabilities of step-parents and step-children considered in the note to *Bartley v. Richtmyer*, 53 Id. 345.

GUARDIAN CAN NOT EXCEED INCOME OF WARD'S ESTATE: *McDowell v. Caldwell*, 16 Am. Dec. 635, and note to *Villard v. Robert*, 49 Id. 657.

SMITH v. FORTESCUE.

[*Bushner's Equity*, 127.]

ONE SELLING GOODS TO EXECUTOR PERSONALLY AND TAKING NOTE DUE ESTATE in payment, with full knowledge of the facts, is liable to an administrator *de bonis non* for the proceeds of the note.

CHARLES B. RUSSELL was the executor of Benjamin Russell. The defendant Fortescue sold Charles B. Russell a quantity of corn, and accepted in payment a note due the estate, drawn by one Warner, with one Slade as security. Fortescue had full knowledge of the fact that the note was due the estate. C. B. Russell having died, the plaintiff was appointed administrator *de bonis non* of the estate, and brought suit against the defendant for the proceeds of the note, it having been paid him. Other facts appear from the opinion. The cause was removed to this court.

Donnell, for the plaintiffs.

Shaw, contra.

By Court, NASH, C. J. (after stating the case). It is abundantly proved by the depositions on file that the defendant Fortescue did know that Charles B. Russell purchased the corn of him for his own use. In the first place, his denial is evasive. His statement is that "Charles Russell kept a country store and traded for corn and again sold it, generally at an advance by retail, or shipped it to a northern port with a view to profit expected from such sales, and for money; that he did not inquire

of him, and does not know, whether said Russell bought said corn for his own use, or to raise money on it to pay the debts of the said Benjamin Russell's estate," etc. This statement is sufficiently suspicious to deprive it of all weight as an answer to the plaintiff's interrogatory. Weakened as it is by the terms in which it is clothed, it is entirely destroyed by the proofs. Mr. Mason's deposition shows that when Fortescue was talking of selling the corn to Russell, he told the deponent that William J. Smith had forewarned or begged him not to take the Warner note, and that he had promised him he would not; but that afterwards, Fortescue told him he had concluded to take it, as he was getting a better price for his corn—that Russell had offered him his own note, but he was afraid of it, and that Russell was compelled to have the money to pay in bank. Mr. May proves that before the corn was sold he heard the plaintiff tell Fortescue not to take the Warner note, and that Russell would use the funds for his own purposes. An executor and an administrator have the legal title to the property of him they represent, and may sell and dispose of it so as to convey the title that is in him, and a purchaser will acquire a valid title, unless he knows that the trustee is violating his trust—as that he is using the fund for his own purposes, to pay his own debt. Nor is it necessary that the purchaser should have an actual knowledge of the particular fraud intended. If anything appears calculated to excite his attention, the party is considered in equity as having knowledge of all that the inquiry would have disclosed: *McLeod v. Drummond*, 17 Ves. 159; *Erum v. Bowden*, 4 Ired. Eq. 281; *Wilson v. Doster*, 7 Id. 231. It was the duty of Fortescue to have made the necessary inquiry—he made none, as he states himself, and with the evident intent to evade its effect, and with the knowledge that Charles B. Russell wanted to raise money by the sale of the corn to pay his debt in bank.

To sum up the case, as far as the defendant Fortescue is concerned—here is a man dealing with an administrator for the funds of the estate, with full knowledge of that fact—for not only is he informed of it, but upon its face the note is payable to Russell, as administrator—he is put upon his guard not to take it, that the administrator is using it for his own purposes—the case is too plain to occasion a moment's hesitation in saying we are entirely satisfied that he did know that Russell was abusing his trust—that he wanted the money which the corn would bring, not to pay any debt due by the estate of Benjamin,

but to pay in bank on his own debt. He was, in the transaction, a *particeps criminis* of a gross fraud.

The bill is dismissed as to Warner and Slade, with costs as to Warner, but none as to Slade, as he does not answer. They had a right to take up the note, by paying its contents to any legal holder; and as to Willord also, the bill states that his intestate died insolvent—he therefore has no assets.

There must be a decree against Fortescue for the amount of the note, with interest from the time it fell due, and he must pay the costs of this suit.

Decreed accordingly.

McDOWELL v. SIMMS.

[*BUSBECK'S EQUITY*, 180.]

RESCISSON OF SALE OF LAND PURCHASED AT AUCTION SALE, ON GROUND OR BY-BIDDING, will not be granted where the grantees did not file their bill for a rescission till a year and six months after the discovery of the by-bidding.

BILL for rescission of contract for the sale of land purchased at an auction sale by the complainants. The opinion states the case.

James Iredell and N. W. Woodfin, for the plaintiffs.

Avery and Guion, contra.

By Court, NASH, C. J. This case is now before us for a final hearing. At August term, 1849, 6 Ired. Eq. 278, the interlocutory order dissolving the injunction which had been granted to stay the collection of the money due upon the bonds given by the plaintiffs for the purchase money of the land was affirmed. The original bill sought to set aside the contract upon the grounds: 1. That the defendants committed a fraud upon the plaintiffs in the sale, by representing that the land contained a valuable gold mine; and 2. Because by-bidders or puffers were employed by the defendants, without the knowledge of the plaintiffs, to run up the land, whereby they were induced to bid for it a price far beyond its value. In their answers the defendants deny the first ground of fraud; and the evidence in the cause does not sustain the allegations of the bill. Upon the second charge the defendants admit that they did employ Preston Long to bid for them, without any intent to defraud the persons who were disposed to bid, but simply to prevent the land from

being sacrificed. There is some contrariety of opinion on this question in the English common-law courts and those of chancery. In *Bexwell v. Christie*, 1 Cowp. 395, Lord Mansfield declared "it was a fraud upon the sale and upon the public" to employ a puffer or by-bidder to run up the property, upon the principle that good faith ought to be the basis of all dealings between man and man. That case was followed by *Howard v. Castle*, 6 T. R. 643. That was an action on the case to recover damages for a refusal on the part of the defendant to complete a sale—there having been a resale in consequence of such refusal. On the trial it was shown that the defendant, after he had bid off the property at the sale, discovered that he was the only real bidder—all the others having been puffers employed by the plaintiff. The defendant, upon making this discovery, immediately refused to comply with the contract. Lord Kenyon expressed in warm terms his admiration of the noble principles of morality and justice announced by Lord Mansfield, and winds up by saying, "He met the question fairly, and made a precedent which I am happy to follow." Ashurst, J., in a single sentence expresses his opinion: "If one person is induced to bid at an auction sale without exercising his own judgment, and that by the owner himself, the parties do not meet on equal terms." This is of course said in reference to the case then before the court. On the other hand, Lord Rosselyn, in *Conolly v. Parsons*, 3 Ves. jun. 625, in note, declares that it was no objection to a sale by auction that by-bidders were employed, and expresses his disapprobation of both cases at law referred to; and in reference to the latter says, "It must have turned upon the fact that there was no real bidder, and the person refused instantly." Judge Pearson, in delivering the opinion of the court on the former argument, observes upon the above authorities: "We are not called upon to decide the question definitely, for, be it either way, it is certain that a purchaser who wishes to avail himself of such an objection must do so as soon as the fact comes to his knowledge." When the case went back to the court of equity the plaintiffs, by permission of the court, amended their bill. In it they state that "at the time they purchased the mine, and gave their bond, the fact of the by-bidding was entirely unknown and unsuspected by them; and they did not come to the knowledge of it, or have cause to suspect it, until long after the sale." If the plaintiffs had made good their allegation by their proofs, it would have become necessary for the court to decide whether the facts disclosed in the case of the by-

bidding were fraudulent or not; but they have not done so. The only witnesses who speak to this point are General Bynum and James Weaver. The former states that after the plaintiffs had abandoned the mine, and after the action was brought on the bond, Colonel Jefferson, the agent, told him that a by-bidder was employed at the sale; and that he communicated the fact to one of the plaintiffs, Mr. McDowell, a short time before the bill was drawn, but sometime before it was filed. Mr. Weaver states that he was the overseer of the plaintiffs in working the Simms mine, and that he commenced working in October, 1845, and that they worked there from five to seven weeks, when the hands were removed to another mine of the plaintiffs, half a mile distant, where he worked six months. That while working on the Simms mine he boarded at the house of A. H. Simms, one of the defendants, who told him that Long was employed as a by-bidder; and that he communicated this fact to Mr. McDowell, either while he was working in the Simms mine or soon after he went to the Collins mine, or it may have been six months after.

The bill was filed January 21, 1848; for that is the date of the judge's fiat for the injunction. We wish now to ascertain from this testimony, as near as we can, when the plaintiffs received their first information that a by-bidder had been employed. Weaver has given three starting points. The first is, while he was working in the Simms mine. He went there the twenty-fourth of October, 1845, and remained from five to seven weeks—say seven; and let us take the medium time—that will bring us to the twenty-ninth of November, 1845. If he communicated the information at that time, then two years and two months elapsed before the bill was filed. Let us now take the six months—after the removal of the hands to the Collins mine; and there will have passed a year and six months before the plaintiffs complained. This is the shortest time, according to this witness, which passed, after the information was communicated to the plaintiff, before they commenced operations. This we think was too long. We are inclined to think it was whilst the witness was working at the Simms mine that he communicated the information to Mr. McDowell; for he was in the employment of the plaintiffs, and was requested by McDowell to get information from the defendants upon the subject of the sale of the mines. If that was the fact, it makes the case still more conclusive against the plaintiffs on this point. For as they received the information, if they wished to rescind the contract,

they ought, without any unnecessary delay, to have communicated to the defendants their wish to do so. Instead of so doing, they still continued to work the mine and to test its value—"so that, if it turned out not to be rich, they might fall back upon the objection that there was a by-bidder"—as observed by his honor Judge Pearson, in delivering the former opinion above referred to. "There must be good faith on each side, and as soon as a purchaser finds out there has been by-bidding, he must make his election." It is said that the plaintiffs were entitled to take time to ascertain the facts, before they could be required to involve themselves in a lawsuit. That is true; but as soon as they discover the fact of the by-bidding they must make their election and notify the vendors of their wish to annul the contract on that ground. By so doing they put it in the power of the latter to rescind, and thereby enable themselves to look out for another purchaser; and not, as in this case, keep the property twelve or eighteen months, and then ask for a cancellation. A plaintiff in equity recovers upon the allegations of his bill; and only when they are supported by sufficient evidence. Here the allegation of the time when they discovered the alleged fraud is too indefinite. "Until long after the sale" conveys no precise idea as to time, and no dates are given; and according to the testimony of Weaver, viewed in any aspect, the plaintiffs delayed too long in making their election.

Bill dismissed with costs.

SPECIFIC PERFORMANCE BARRED BY DELAY IN APPLYING FOR RELIEF:
See *Francis v. Love*, 3 Jones Eq. 321, and *Pettijohn v. Williams*, 2 Id. 358, citing the principal case.

DELAY WILL DEPRIVE OF RIGHT TO RESCIND: See reference in note to *Mason v. Bovel*, 43 Am. Dec. 655; *Johnson v. Evans*, 50 Id. 672, note.

AGREEMENT PREVENTING COMPETITION AT AUCTION SALE is a fraud on the vendor: *Whittaker v. Bond*, 63 N. C. 293; *Jones v. Caswell*, 2 Am. Dec. 134, and note; *Towle v. Leavitt*, 55 Id. 204, note.

RESCISSON OF CONTRACTS IN EQUITY where there is no fraud, accident, or mistake: See *Hough v. Hunt*, 15 Am. Dec. 572; see also *Johnson v. Evans*, 50 Id. 672, note.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

SACKETT v. TWINING.

[18 PENNSYLVANIA STATE, 199.]

SALE BY ORDER OF ORPHANS' COURT IS JUDICIAL SALE. The doctrine of *caveat emptor* applies to such sales.

DECREE OF ORPHANS' COURT, approving a sale of property made by its order, will not be inquired into collaterally.

BY CONFIRMATION OF ADMINISTRATOR'S SALE by the court his liability to the heirs for the purchase price becomes fixed, and he acquires the right to recover from the purchaser.

IT IS DUTY OF PURCHASER OF LAND AT ADMINISTRATOR'S SALE TO MEASURE SAME before the sale is confirmed. Having failed to do so, and accepting a deed for the land, paying part of the purchase price and giving a bond for the balance, he is not entitled to a deduction from the bond because there were a few less acres than at first supposed.

In December, 1848, Abraham Sackett, administrator of the estate of Joseph L. Sackett, in pursuance of an order of the orphans' court, offered for sale a tract of land purporting to contain seventy-two and three fourths acres, nine perches, more or less, and defendant Twining purchased the same at sixty-five dollars per acre. Among the conditions of sale to which defendant agreed was: "1. The property to be sold by the acre; and if the purchaser should wish to have it surveyed, it must be at his own expense." The sale was confirmed by the court February 5, 1849, and on April 2d following Abraham Sackett executed and delivered a deed to Twining. Twining paid part of the purchase money, and executed a bond for the balance. A judgment was afterward entered upon this bond, and this proceeding is a *scire facias executio non* upon said judgment. At the hearing, on the part of the defendant, evidence was introduced that

in January, 1850, upon a resurvey of the premises, it was discovered that there was five acres and fifty-six perches less than supposed at the time of the sale. The court below instructed the jury that if they found that both parties at the time of the sale mutually depended upon the old survey, and were thus led into error, and that the amount of the deficiency was equal to the sum claimed upon the judgment, the plaintiff was not entitled to recover. Plaintiff excepted to this charge. A verdict was rendered for defendant, and plaintiff now assigns the charge of the court as error.

Chapman and Roberts, for the plaintiff.

Du Bois, for the defendant in error.

By Court, COULTER, J. The sale in this case was made by order of the orphans' court, the heirs and legal representatives declining to take the land at the appraisement. It was therefore a judicial sale, made by order of a court having jurisdiction over the subject-matter, and over the administrator who made the sale.

The sale was by virtue of a decree of the court, after hearing all parties interested, and was approved and confirmed by them, at which time, that is, after the return of sale by the administrator and before confirmation, the purchaser, the heirs, and the administrator had a right to be heard. We can not overturn or impugn the decree of the orphans' court confirming the sale in this collateral proceeding. It was a judicial sale; as an individual, the administrator had no authority whatever to make the sale. But an officer of the court for that purpose, and to execute their decree, he had; and if the court approved of his proceedings, and confirmed the sale, it became valid and binding, except for fraud, in all collateral proceedings. The decree of confirmation fixed the administrator for the amount of the purchase money, for which he was accountable to the heirs, and which he was bound to distribute under the direction of the court according to law. He has therefore a clear right to recover it from the purchaser. Being a judicial sale does not take away the rule of *caveat emptor*, but more emphatically enforces it as to quantity contained in the bulk or gross. If, therefore, the purchaser bid by the acre, it was his duty to see before confirmation that the tract contained the quantity estimated. Indeed, he had a right by the conditions of sale to have the tract surveyed at his own cost, if he chose. But this he neglected, and the administrator reported the sale to court for a gross sum,

which was duly confirmed. Deed was made by the administrator in pursuance of the decree, the purchase money in part paid to the administrator, and judgment bond given for the residue. Thus the purchaser permitted the sale to be confirmed by the court, and the administrator irrevocably fixed for the amount; and he afterwards confirmed it himself by accepting a deed, and securing the part of the purchase money not paid. His own negligence and laches can not be allowed to injure an innocent man, and to protect himself from harm. In *King v. Gunnison*, 4 Pa. St. 171, and *Vandever v. Baker*, 13 Id. 121, and the cases there cited, it was ruled that an orphans' court sale was a judicial sale, and that *caveat emptor* applied to it. In all these cases, it is true, the sale was decreed for the payment of debts. But that marks no distinction in this respect; because it is not the object of the sale, but the mode and manner, the action of the court, the decree of the court, and the parties being called to judgment, which gives it character and makes it judicial. The distribution of the fund subsequent to confirmation is a matter between the administrator and the legal representatives, with which the purchaser has nothing to do, and which can not affect the matter between the administrator and the purchaser. The cause was argued as if it had been a private sale, which it is not. But even in that aspect, it seems to be well settled by the weight of authority, that where there are articles of agreement which are afterwards consummated and fulfilled, by the acceptance of a deed, and giving bonds for the purchase money, the transaction is at an end, if there be no fraud, or such mistake as would be equivalent to it. There was neither fraud nor mistake here. The tract was sold, estimated at seventy-two acres, more or less; the bidding was by the acre, so as to give the purchaser the benefit of a resurvey if he chose to have it made at his own cost. He did not do that, but chose to complete the transaction by the solemnity of a deed, and giving his bond. He did this with his eyes open and his volition unbiased. He had a right to do so. He is bound by it. The judgment is reversed, particularly on the first ground, which ends the cause.

Judgment reversed, and *venire de novo* awarded.

CAVEAT EMPTOR, RULE OF, APPLIES TO EXECUTION SALES: *Murphy v. Higginbottom*, 27 Am. Dec. 395; *Smith v. Painter*, 9 Id. 344; *Davis v. Murray*, 12 Id. 681; *Henderson v. Overton*, 24 Id. 492; *Friedly v. Scheetz*, 11 Id. 691, and notes to the above cases; Freeman on Executions, sec. 301. The application of the doctrine of *caveat emptor* to execution sales is discussed at length

in note to *McGhee v. Ellis*, 14 Am. Dec. 124. In this note the rule that where the sale is conducted fairly the purchaser takes the title at his own risk, is positively asserted. A purchaser at a judicial sale can only obtain relief for defects in his title by resisting the confirmation of the sale, and a court of equity will not enjoin a judgment recovered for the purchase price of property because of such defects in the title: *Threlkeld v. Campbell*, 44 Id. 384. See also *Commonwealth v. Dickinson*, 43 Id. 139, and note.

SALE BY ADMINISTRATOR IS JUDICIAL SALE, and operates *in rem*. In such a case it is a general rule that *caveat emptor* applies, and the purchaser takes his purchase without warranty, express or implied: *Lynch v. Baxter*, 51 Id. 735; *Robb v. Mann*, Id. 551. This latter case and the note thereto discuss the status of the purchaser at a judicial sale, before the confirmation thereof.

CHOUTEAUX v. LEECH & Co.

(18 PENNSYLVANIA STATE, 224.)

PARTIES MAY BIND THEMSELVES TO LIABILITIES OF COMMON CARRIERS upon one occasion only, and it is no defense to say that they have never done so before.

CONTRACT WITH AGENT IS CONTRACT WITH PRINCIPAL when made about the matter to which the agency relates. The contracting party is not bound by secret limitations of the agent's authority, of which he has no notice.

PRINCIPALS CAN NOT CLEAR THEMSELVES FROM RESPONSIBILITY for the acts of their agents by showing that they authorized the act done, but did not intend that its legal consequence should follow.

MISTAKE IN BILL OF LADING, by erasing or neglecting to erase a word, can be proved like any other fact, by circumstantial as well as positive evidence.

A FORM OF BILL OF LADING PRINTED TO BE USED AT PITTSBURGH, should have the word "Pittsburgh" erased and the word "Cincinnati" interlined in order to be used at the latter place. That such change had been made in the dating of the bill is a circumstance tending to show an intention to change it all through, and is sufficient to go to jury.

COMMON CARRIERS SHOULD BE HELD TO STRICT ACCOUNTABILITY, and slight evidence should be sufficient to set aside any special provision in a bill of lading, intended to relieve them from their ordinary legal responsibility.

FURS WHICH BECOME WET WHILE IN CUSTODY OF COMMON CARRIER should be opened by him and dried, as it is his duty to lessen if not altogether prevent the effect of an accident.

ACTION for damages to certain packages of furs shipped from Cincinnati to New York. Defendants reside at Pittsburgh, and the goods were shipped from Cincinnati by defendants' agents, to that place, upon the steamer *Defiance*, which ran upon a snag during the trip, sprung aleak, and the furs became wet. It was admitted by defendants that they were common carriers

upon the railroads and canals of Pennsylvania between Pittsburgh and Philadelphia, but that they were carriers upon the Ohio river they denied. They did not own the steamer Defiance, and the only purpose for which they employed agents at Cincinnati was to secure freight which was to be sent upon the Ohio river steamers to Pittsburgh, where they would receive it and ship it upon their lines. At the time of receiving the furs at Cincinnati, defendants' agents signed a bill of lading therefor in the usual form. This bill was printed for use at Pittsburgh, and at the time of signing it the word "Pittsburgh" was erased, and the word "Cincinnati" inserted. This change was made only at the top of the bill upon a line with the date, and the remainder of the bill left unchanged. When the furs reached defendants at Pittsburgh, they were packed in bundles, with the skin side out, and the fur side concealed on the inside. The exposed side being greasy showed no sign of having recently been in the water, nor was there anything to call defendants' attention to that fact. Defendants immediately forwarded the furs to New York, and they were received by plaintiffs in a damaged condition. In the different counts of his complaint, plaintiff charged defendants with being common carriers from Cincinnati to New York and from Pittsburgh to New York, and with having undertaken to safely carry their goods, and having failed to do so, and with having taken poor care of said goods, whereby they were greatly damaged. At the trial, the judge, among other charges, instructed the jury as follows: "Did the defendants, or their agents, exercise ordinary care and diligence in preserving the goods committed to their charge? This is a question for you. I instruct you that when goods and merchandise, as here, received by a common carrier to be delivered in good condition, 'the dangers of the rivers excepted,' get wet in consequence of accident, and no exertion is made by the carrier to dry them, and they are damaged, in such a case the carrier is liable. He is bound at least to use some exertion to prevent the effects of the injury, as long as it will probably avail anything; and for this purpose he would be right to open the packages in which the furs were contained." Defendants' fifth assignment of error was that the court erred in refusing to allow one of their witnesses to answer the question, "Were D. Leech & Co. at any time common carriers on the Ohio river between Cincinnati and Pittsburgh?" Their sixth assignment was that the court erred in refusing to allow their witness to answer: "Between what points were D. Leech & Co. carriers?" The seventh assign-

ment appears in the opinion. Irwin & Foster were defendants' agents at Cincinnati. A verdict was rendered for plaintiffs.

W. B. Reed and H. M. Phillips, for the plaintiff.

McMurtrie and McIlvaine, for the defendants.

By Court, BLACK, C. J. The evidence which the court in the fifth and sixth assignments of error is complained of for rejecting was intended to prove that the defendants were not common carriers west of Pittsburgh; in other words, that they were not accustomed to carry goods for hire for all who chose to employ them on the Ohio river. But the evidence was properly rejected, because the right of the plaintiff to recover, etc., depended on the obligation created by the particular contract on which the suit was founded. If they bound themselves on this occasion to the duty of common carriers, it is no defense to say that they had never done so before, or that it was not their direct or principal business: *Gordon v. Hutchinson*, 1 Watts & S. 285 [37 Am. Dec. 464]; *Turney v. Wilson*, 7 Yerg. 340 [27 Am. Dec. 515]; *Moses v. Norris*, 4 N. H. 304.

In the seventh specification it is said the judge erred because he refused to permit the defendants to ask the question, "What were the powers of Irwin & Foster, and what was the extent of their agency?" When an agent is appointed, a contract made with him about the business to which the agency relates is a contract with the principal, and the validity of the contract is not affected by a limitation of the agent's authority, of which the other contracting party had no notice. This would have been enough to make the exclusion of the proposed evidence perfectly proper. But there was another reason. The defendants did not assert in the *nisi prius*, nor was it any part of their argument here, that the agents had not authority to do what they did. Now, if the acts done by them exposed their principals to the risks of common carriers on the Ohio, the principals can not, of course, clear themselves from responsibility by showing that though they authorized the act, they did not intend that its legal effects should follow.

The greatest pressure of the defendants' argument was on the exception to that part of the charge which submits to the jury the question whether the words, "the responsibility of the line to commence upon the shipment of goods from Pittsburgh," were or were not inserted in, or rather left unerased from, the bill of lading by mistake. It is contended that there was no evidence of such mistake. But we think otherwise, for reasons

which may be stated very briefly. A mistake like the one alleged here can be proved as any other fact is proved, by circumstantial as well as by positive evidence. There are several facts from which it may be inferred. The printed bill of lading was manifestly intended to be used at Pittsburgh. In order to make it answer for Cincinnati, it was obviously proper to strike out "Pittsburgh" wherever the word occurred and insert "Cincinnati." It was so altered in the date, and the omission to do so at the other place certainly looks more like an accident than anything else. It is not certain, but it is probable, that the object of having the contested clause in a Pittsburgh bill was to prevent the responsibility of the defendants from commencing when the goods were received at their warehouse, instead of attaching only from the time of their actual shipment. The dangers of the river navigation are excepted, and this by plain construction makes them liable for the other dangers which are not excepted. They received the full freight from Cincinnati to New York, and this is wholly inconsistent with the notion that they were mere agents for the shipment of the furs, and not carriers from Cincinnati to Pittsburgh, as well as on all other parts of the route. Other facts might be mentioned, but these are enough to show that there was some evidence of mistake, and the judge was right in submitting it to the jury.

It is of the utmost importance to the commerce of the country that carriers should be held to strict accountability. Gross wrongs would be practiced every day if the laws on this subject were relaxed. Slight evidence ought to be sufficient to set aside any special provision in the bill of lading which is intended to relieve the carrier from his ordinary legal responsibility. And this not only because public policy requires that carriers should have the strongest interest in the performance of their duties, but also on account of the manner in which such stipulations are generally made. Goods are commonly sent by the owner to the carrier's place of business, where they are received, and the bill of lading made out by the carrier or his clerk. It is often not seen by the owner until it is too late to insist on a change in the terms. It can hardly be called a contract, for a contract requires the assent of both parties. The better rule perhaps would be to treat all provisions of this kind as void, unless inserted by the express consent of the employer.

The charge that the defendants were bound to have the furs unpacked and dried is said to be erroneous, but that is not our

opinion. The decision of the judge on this point is well supported by clear and unanswerable reasoning; is sustained by a case directly analogous: *Bird v. Cromwell*, 1 Mo. 58 [13 Am. Dec. 470]; and is opposed by no authority which we have been able to find.

Judgment affirmed.

PRIVATE PERSON, BY UNDERTAKING TO CARRY Goods FOR HIRE, subjects himself to the liability of a common carrier: *Powers v. Davenport*, 43 Am. Dec. 100, and note; *Littlejohn v. Jones*, 39 Id. 132, and note. Whether or not a party has subjected himself to the liability of a common carrier is a question of fact for the jury: *Id.*

AUTHORITY OF GENERAL AGENT CAN NOT BE LIMITED BY PRIVATE INSTRUCTIONS not known to the party with whom he deals: *Lobdell v. Baker*, 35 Am. Dec. 358; *Bryant v. Moore*, 45 Id. 96; *MERCHANTS' BANK v. CENTRAL BANK*, 44 Id. 685; *Commercial Bank v. Kortright*, 34 Id. 317; *Walker v. Skipwith*, 33 Id. 161, and the notes to the above cases; 1 Parsons on Cont. 49, where the author cites the principal case to the above point; see also *London S. F. S. v. Hagerstown S. B.*, 36 Pa. St. 503; *Grafus v. The Land Co.*, 3 Phila. 447.

ADMISSIBILITY OF PAROL EVIDENCE TO SHOW MISTAKE IN WRITTEN INSTRUMENT: See *Christ v. Dissenbach*, 7 Am. Dec. 624, and note; *Smith v. Williams*, 4 Id. 564, and note; *Lessee v. Dugans' Adm'r*, 34 Id. 427, and note; *Moore v. Vicks*, 32 Id. 301.

LIMITATION OF CARRIER'S RESPONSIBILITY BY NOTICE OR SPECIAL PROVISION: See *Barney v. Prentiss*, 7 Am. Dec. 670; *Orange Co. Bank v. Brown*, 24 Id. 129, and note 137; *Turney v. Wilson*, 27 Id. 515, and note; *Beckman v. Shouse*, 28 Id. 653, and note.

COMMON CARRIER'S OBLIGATION TO DRY Goods INJURED BY WATER.—The case of *Bird v. Cromwell*, 1 Mo. 81, cited in the opinion in the principal case, is reported in 13 Am. Dec. 470. This case is almost identical with the principal case, and in the note thereto the question is discussed at some length. In *Cameron v. Rich*, 53 Id. 670, the court held that the carrier would be liable for damages caused by dampness generated by the ordinary operation of natural causes, which might have been prevented by skill and care on the part of the carrier: See note to this case. This rule is somewhat modified in the case of *Steamboat Lynx v. King*, 49 Id. 135.

STRIMPFLER v. ROBERTS.

[18 PENNSYLVANIA STATE, 283.]

RESULTING TRUST ARISES IN FAVOR of one who pays the purchase price of land, against the party in whose name the conveyance is made. This rule extends to purchasers from the commonwealth.

RESULTING TRUST MAY BE ESTABLISHED OR CONTRADICTED by parol evidence, even in direct contradiction of a deed, patent, or warrant.

EVIDENCE OF AGENCY.—Evidence that a person is in poor circumstances, a clerk in the land office, and that he is credited with thirty-two thousand dollars upon the books of that office in the same manner as he is with the purchase price of defendant's land, is admissible as tending to prove that he paid said purchase price as agent for defendant.

To ESTABLISH PECUNIARY CONDITION OF MAN AT CERTAIN DATE, evidence that his children forty years after were the owners of considerable property is too remote to be safe.

TITLE PAPERS NEED NOT BE INTRODUCED TO SHOW CIRCUMSTANCES OF PARTY.—General acts of ownership, such as a letter to his agent requesting him to pay taxes on certain property, are admissible.

PARTY WHO UNDERTAKES TO ESTABLISH RESULTING TRUST BY PAROL, takes the burden of proof on himself. He claims an estate in land, not only without a deed, but in opposition to the written title; ordinarily such trusts should not be favored.

COURTS OF EQUITY, THOUGH NOT BOUND BY STATUTE OF LIMITATIONS, close their doors against stale demands as sternly as the courts of law.

TWENTY-ONE YEARS IS TIME WHICH RAISES PRESUMPTION which will act as an interest in land, and this presumption unrepelled will defeat any claim that is set up against it.

IMPLIED TRUST IS NOT WITHIN STATUTE OF USES, and consequently does not become executed by force of that statute. Such a trust can only be executed by a voluntary conveyance of the trustees, a decree in chancery, or a judgment in ejectment.

COURTS OF EQUITY DISCOUNTENANCE STALE DEMANDS.

WHERE WARRANT IS ISSUED TO ONE PERSON, AND PURCHASE MONEY IS PAID BY ANOTHER, and the patent is afterwards taken out by the nominal warrantee, the right of him who paid the purchase money is gone, unless he takes possession of the land, or brings ejectment to recover it within twenty-one years from the date of the warrant, and after that lapse of time he can not recover, no matter how clearly he may be able to prove that the legal owner was in the beginning a trustee for him.

ERROR to the common pleas of Schuylkill county. This is an action of ejectment to recover certain lands in the above county, brought by the defendants in error against the plaintiffs in error. Plaintiffs below based their claim to recover upon title derived from Peter Benson, deceased, and defendants upon title derived from Sophia Myer who conveyed to Cumberland Dugan. The warrant to Sophia Myer was dated thirty-first of December, 1794, and it is claimed by plaintiffs below that the purchase payment for this warrant was made by Peter Benson, and that consequently a resulting trust arose in his favor. As evidence that Peter Benson paid the purchase money, different entries in the land-office blotters were offered in evidence, all dated in 1794. Defendants below introduced evidence showing the original application of Sophia Myer, a deed from Sophia Myer to Cumberland Dugan for the disputed premises, dated March 10, 1801, and a patent to Cumberland Dugan dated October 1, 1802. It was also shown that Peter Benson was a clerk in the land office between 1792 and 1797, and one J. L. Wallace testified that it was usual for the clerks in the land office to transact

business for land applicants, and that Peter Benson did more of this than the other clerks. They further offered to prove that the credits in the blotter in the name of Peter Benson, by which the purchase money of the disputed tract appears to have been paid, were not in fact his credits, but were entered in his name for convenience sake for the true owners; that during his clerkship in the land office upwards of one thousand three hundred and eighty-six warrants were entered as having been paid by him, and that the fees upon said warrants amounted to over thirty-two thousand dollars; that he never perfected his title to any of said lands; that he was poor and unable to pay such large sum; and that no claim was ever made by him to any of said land. The court refused to admit this evidence, and defendants took their first bill. Plaintiffs below then offered in evidence a letter from Peter Benson to his agent, William Potter, directing him to pay the taxes on a certain tract of land in Huntingdon county. They offered this for the purpose of showing property in Benson and his ability to pay for his different land warrants. The court admitted this evidence over the objection of defendants, who then took their second bill. Plaintiffs introduced one Marshall, who testified that the heirs of Peter Benson in 1837 were the owners of tracts of land in different counties of the state, which tracts were worth considerable money. The court accepted this evidence, and defendants took their third bill. The remaining facts appear from the opinion.

Bannan and Mallery, for the plaintiffs in error.

Hughes and Meredith, for the defendants in error.

By Court, Black, C. J. A warrant for four hundred and forty-five acres and one hundred and twenty perches, issued from the land office, in the name of Sophia Myer, on the fifth of May, 1794. A survey was made, including the land in dispute, on the fifth of January, and returned on the tenth of February, 1795. On the tenth of March, 1801, Sophia Myer conveyed to Cumberland Dugan, by deed poll of that date, and a patent was issued to Dugan the first of October, 1802. It appears from the blotters and vouchers in the land office and the day-book of the receiver general that this warrant and thirty-five others were paid for by the application of credits, which Peter Benson had on the books of the office for lost warrants surrendered. The plaintiffs claim under Benson, whose heirs, on the eighteenth of April, 1838, conveyed the Sophia Myer tract and five others, on which the purchase money was paid by

their father, at the same time and in the same way, to Henry K. Strong, for the consideration of one dollar and services rendered. Mr. Strong conveyed certain undivided parts to the other plaintiffs. There was also a third title given in evidence, under a warrant to Henry Feather, dated in 1818; but being of no value in itself, and having no influence on the rights of the parties who claim under Benson or Dugan, it is not necessary to notice it.

The plaintiffs assert their right to recover through Benson, for whom they allege that the holder of the legal title is but a trustee. The defendants, without pretending to be the owners of the patent, rely on it as showing a fatal weakness in the title of their adversaries.

It is the law of England and of Pennsylvania, that where one buys land and pays for it with his own money, but permits the conveyance to be made in the name of another, a resulting trust arises in favor of him who paid the purchase money; and the nominal grantee holds the land as trustee for the real purchaser. This principle is applicable as well to purchases from the commonwealth as to conveyances from one private individual to another. The person whose name is used as a warrantee is a trustee for him who took out the warrant and paid the fees and purchase money: *Cox v. Grant*, 1 Yeates, 164; *Fogler v. Eric*, 2 Id. 119.

A resulting trust of this sort may be established by parol, even in direct contradiction of a warrant, patent, or deed; and as it may be proved, so it may be contradicted by the same species of evidence. In the present case the plaintiffs had a right to show, by any legal evidence within their power, that Benson had paid the purchase money; and they did prove it by the blotters, vouchers, etc., usually relied on in old cases. It was proper, also, to permit the defendants to prove that he did not make the payment for himself, or on his own account, but as agent for Sophia Myer, or somebody else; and any circumstance which would throw light on the transaction or explain its true character ought to have been received.

After the extracts from the books in the land office had been read, and some evidence had been given by the defendants, tending to show that Benson had acted as a mere agent in paying for this and other warrants, the defendants offered to prove that Benson, who was a clerk in the land office, and a man of very little property, was credited, on the same books, with the purchase money of one thousand three hundred and eighty-six

warrants in the old purchase, amounting in the aggregate to more than thirty-two thousand dollars, and that he never laid claim to any one of the tracts; but, on the contrary, suffered them, in many cases, while he was still in the office, to be patented to other persons. This ought to have been admitted. That a man in moderate circumstances should have paid this large sum of money on his own account, without afterwards giving any attention to the immense estate which he had thus acquired, is incredible. It can only be accounted for by supposing that in making these numerous and heavy payments he was acting as the agent of other persons. The court received and submitted to the jury the testimony of Wallace, that Benson was in the habit of receiving fees and transacting business for people in the land office. If the facts set out in the first and fourth bills of exception had been also admitted, they would have gone one step further, and shown that it was his custom, in paying money for his employers, to take credit on the books in his own name; and from this the argument would have been legitimate and fair, that the entry in the present case was made in the same way.

The testimony of Marshall, which was admitted by the court, and constitutes the third bill of exceptions, was to circumstances too remote to be safe, even though the means proposed to establish them had been legal. The pecuniary condition of Benson at the date of the warrant was important, to be sure; but that is not to be shown by proving that his children, more than forty years afterwards, had claims to land in several counties of the state.

The mortgage for land sold in Westmoreland by the elder Benson in his life-time might have been evidence to rebut the proof which the other side had given of his poverty, if it had been produced. But I see nothing in this case to justify the admission of secondary evidence, when the primary might have been had.

The letter from Benson to Potter, dated in 1801, was properly admitted. It is not necessary to produce the title papers of a man's property, when the object is merely to prove his circumstances. General acts of ownership are sufficient. A letter requesting an agent to pay taxes for land may be very slight evidence even for such a purpose, but it is admissible.

The evidence contained in the fifth bill of exceptions was rightly rejected. It consisted of agreements and letters between Myer, Young, and Dugan. The parties to these contracts, and

those who carried on the correspondence, were bound by what they contained. But as to Benson and those claiming under him, they were *res inter alios acta*.

Before we consider the main point on which the charge of the court below is objected to (and we propose to consider no others, the rest not being sustained), it may be well to recall the evidence which is said to establish the trust in favor of Benson, and the circumstances, confirmatory and infirmatory, which go to support and overthrow it. John Keble's blotter and other books in the land office show that Benson was charged with the price of this warrant, and that he paid it. This blotter was never considered a record; and certified copies were not admitted in evidence until the act of 1823 was passed for that purpose: Purdon, 427. Previously to that time the entries were proved and admitted as private papers: *Galbraith v. Detrich*, 8 Watts, 112. The act of assembly did not change their nature as evidence, but only furnished a more convenient means of getting them before courts and juries. They were admitted before and since 1823, apparently upon the rule which admits other private memoranda of deceased persons in evidence, where they were against the interest of the persons making them. But long experience of their accuracy has given them a credit which no other unofficial books have received in our courts. Still they constitute but parol evidence, and are not conclusive proof of anything. That warrants were frequently said by those books to have been paid for by persons who did not actually advance the money, except as agents, no one can doubt; and the fact has been often proved. The defendants attempted to prove it here. They showed that Benson was a clerk in the land office. Clerks were at that time in the habit of acting as agents to an extent which grew into a great evil; and the year afterwards a law was passed to forbid them: Purdon, 732. One aged witness was called, who remembered Benson, and knew that he transacted more business as agent than any of the other clerks. He died in 1801, leaving scarcely any personal property. He paid the purchase money on a great number of other warrants, without afterwards perfecting the titles. The certificate of the receiver general, that the purchase money was paid on the Sophia Myer warrant, was in the usual form, without any mention of Benson's name, and does not appear ever to have been in his possession, but was found among certain title papers which John Myer had delivered to Pott and Boyer. John Myer, and not Benson, handed in the application for the

Sophia Myer and nine other tracts, on all of which the purchase money is marked in the blotter as paid by Benson; but on none of them did he ever take out or apply for patents. The application is marked as Myer's, and is in his handwriting.

The party who undertakes to establish a resulting trust by parol evidence takes the burden of proof on himself. He claims an estate in land, not only without a deed, but in opposition to the written title. Records and deeds are not easily overthrown, as is manifest enough from the stringent rules which this court has often laid down in cases of parol sales. The whole doctrine of resulting trusts is a violation of the sound principles on which the statute of frauds is based, and ought not to be favored, except when the trust originated in the bad faith of the nominal purchaser. The extension of it to cases in which the *cestui que trust* has voluntarily placed his rights in such a condition that he can only establish them by parol, is of doubtful policy; and, like other departures from the statute of frauds, has probably done more mischief than it has ever corrected. For these reasons, it is more than doubtful if any chancellor, upon the evidence which this case presents, would decree specific execution of the trust, supposing the facts to be recent, and time no element in the decision. It may be, indeed, that the frequent use which was made in early times of the names of persons as warrantees, who were not the real owners, for the purpose of evading the laws against engrossing the public lands, entitles this peculiar kind of trust to more than ordinary favor. Certain it is, that the blotter has been allowed to decide very many disputes in favor of the person by whom it showed the money to have been paid; but never, in any case that I know of, where the evidence of agency was as strong as it is here.

The principal question yet remains to be noticed. The defendants insist that the great length of time which elapsed after the date of the warrant, and before any claim was made under Benson, raises a presumption of law which is conclusive against the title derived from him. It is true that the transaction which creates the contest between these parties is entirely too old to be investigated now with the slightest hope of ascertaining the truth. It is impossible for us to feel any confidence in the evidence which can be furnished by men of these times concerning occurrences so remote. Fifty-two years went round between the time when the purchase money for this land was paid and the bringing of the present suit. During all that

time neither Benson, nor his heirs, nor anybody else deriving title from him, made any claim to the land; nor paid taxes for it; nor exercised any act of ownership over it; nor manifested the least sign of consciousness that they had title to it. We are now asked to determine the rights of the parties, on such facts as can be fished up from the oblivion of more than half a century. Nearly two generations have lived on the earth and been buried in its bosom since this business was transacted. Of the men who were then in active life, and capable of being witnesses, not one in twenty thousand is now living. Written documents, whose production might have settled this dispute instantly, have been, in all human probability, destroyed, or lost, or thrown away as useless. The matter belongs to a past age, of which we can have no knowledge except what we derive from history, through whose medium we can dimly discern the outlines of great public events; but all that pertains to men's private affairs is wholly invisible, or only visible in such a sort as to confound the sense and mislead the judgment. "No man," says Mr. Justice Sergeant, in *Foulk v. Brown*, 2 Watts, 215, "ought to be permitted to lie by while his rights can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry." For such reasons as these it is that every civilized society has fixed a limited time within which all rights must be prosecuted. Where this is not done by positive enactment of the legislature, the judiciary calls in the aid of presumption; and courts of equity, though not bound by the statutes of limitation, close their doors against stale demands as sternly as the courts of law.

Time will raise presumptions as conclusive for or against an original title as it will in other cases. We have as little power to read the ashes of burnt papers, or call dead witnesses from their graves to testify in a dispute about business transacted by the land jobbers of the last century, as we would have if the controversy was on any other subject. It is accordingly settled that the non-return of a survey for seven years, without taking possession, or paying the surveyor's fees, is an abandonment of the warrant: *Starr v. Bradford*, 2 Pen. & W. 384. And even where the negligence is imputable to the officer, a long delay will defeat the warrantee's title: *Zerbe v. Schall*, 4 Watts, 140. The title of a warrantee is presumed to have been conveyed where no claim is made under it for a long time: *Galloway v. Ogle*, 2 Binn. 468. A sale of warranted land for taxes, though

irregular and void, if the warrant holder had made early opposition, becomes a perfect title after an acquiescence of twenty-one years: *Read v. Goodyear*, 17 Serg. & R. 350. Payment of taxes for twenty-one years is presumptive evidence of a conveyance from the warrantee: *Taylor v. Dougherty*, 1 Watts & S. 324. A survey unimpeached for twenty-one years is conclusively presumed to have been regular: *Caul v. Spring*, 2 Watts, 390; *Nieman v. Ward*, 1 Watts & S. 68; and that even when there is an unexecuted order of resurvey by the board of property: *Collins v. Barclay*, 7 Pa. St. 67. In short, the courts of this state seem uniformly (and especially of late) to have refused to go back more than twenty-one years to settle any difficulty about the issuing of warrants or patents, or the making or returning of surveys, or the payment of purchase money to the commonwealth. These questions, like others, are disposed of according to the legal presumptions which arise from the lapse of time. The time which raises a presumption, which will act on an interest in land is twenty-one years: *Orr v. Cunningham*, 4 Watts & S. 297; and this presumption unrepelled will defeat any claim that is set up against it. It is very clear, therefore, that the plaintiff's title is either established beyond all dispute, or else made utterly worthless by the lapse of time. Either the trust resulting to Benson from the payment of the purchase money is extinguished, or the title under the patent must be wholly lost to those who claim it. Both these titles can not exist now in the vigor they had fifty years ago, and demand a decision between them on their original merits.

The plaintiffs contend that the presumption ought not to be against them, since the patentee has not, any more than themselves, either taken possession of or paid taxes for the land. Cumberland Dugan did not, from the date of the patent (nor did his heirs), make any open claim to the land, nor perform any of the duties which as owners of it they were bound to perform, until 1837, when they brought an ejectment against the occupants of the land, which seems to be still pending. But it must be remembered that the conveyance of the warrantee and the patent from the commonwealth gave him the legal title, and he was in possession by construction of law. Actual possession would not have made his right any stronger, as against another claimant, who was not himself in possession. His title, on the face of it, was as perfect as it could be made. He needed no judgment or decree of any court to make it better. It was not necessary or possible for him to bring suit

against Benson, or his heirs or alienees, to establish that his legal estate was free from the trust which the plaintiffs assert it was charged with. His non-payment of taxes is proof that he was not a very good citizen; but that is a default for which his title could only be divested by a treasurer's sale. On the other hand, Benson and his heirs had a claim resting in parol, and if they knew or believed it to be just, it was their business to make it appear.

To demand of the *cestui que trust*, under the circumstances of this case, that he should establish his claim before a judicial tribunal within a reasonable time or lose it, is complained of as a hardship by the plaintiffs. They say that no bill in equity could be filed for want of a court having chancery jurisdiction, and that an ejectment could not be brought, because nobody lived on the land. The answer is, that they might have taken possession of the premises and compelled the other party to commence proceedings. They reply that possession ought not to be required, because the land is not fit for cultivation, and the coal has been but recently discovered. This, when put in plainer words, means that the property was not thought to be worth looking after until lately, which is precisely the reason that may be given by almost every man who neglects to prosecute his rights to real estate. But it has never yet been received as a sufficient excuse, and never ought to be. Besides, Benson, if the land was really his, might at least have filed a *caveat* against the issuing of the patent, or demanded a conveyance afterwards.

The opinion of Mr. Justice Kennedy in *Urket v. Coryell*, 5 Watts & S. 60, was much relied on as showing that a patent fraudulently obtained will be of no avail against the true owner. That case was essentially different in all its features from this one. There the party claiming against the patent had not only paid the purchase money for himself, and on his own account, but had the conveyances of the nominal warrantees. Time had raised no presumption against him; for the suit had been brought within much less than twenty-one years. *Correy v. Caxton*, 4 Binn. 149, and *Bixler v. Baker*, Id. 219, are still less to the purpose.

It is also insisted that Dugan obtained the patent by a fraud upon minor children. The heirs of Benson, at the time of his death, were respectively of the ages of ten, eight, and three years, but when the suit was brought they were fifty-seven, fifty-five, and fifty. Their minority, at the time the patent issued,

would not justify their inaction after the disability was removed. An equitable claim to land, founded on fraud, is of all others the sort of claim which ought to be pursued before time has rendered explanation impossible: *Hovenden v. Annesley*, 2 Sch. & Lef. 633.

Another argument much pressed is, that Benson's payment of the purchase money gave him such a use of the land as became immediately executed by force of the statute of uses, 27 Henry VIII.; that he or his heirs became invested with the legal title as soon as the patent passed it from the commonwealth; that having the legal title, they were constructively in possession; and that the presumption from lapse of time is therefore not against them, but in their favor. The inferences are logically drawn, but the premises are not true. An implied trust is not within the statute of uses. Where the use is expressly and immediately limited on the legal estate, it will be executed in the *cestui que use*. But a use limited on a use will not be: 22 Vin. Abr. 268. Where the trust is expressed in the deed which creates the legal estate, the trustee can not set up the statute of limitations, either at law or in equity, against his *cestui que trust*, any more than a tenant for years can do so against his landlord, and for the same reason; namely, because it would be claiming in opposition to the title by which he himself holds. But here the warrant, deed poll, and patent purport to give Dugan the legal as well as the equitable title for his own use, and that of his heirs and assigns. They do not on their face require him to hold it for the use of Benson. If there be anything *in pais* and outside of the written title from which a trust of the land results to Benson, such a trust can be executed in no other way than by the voluntary conveyance of the trustee, or by a decree in chancery, or (what is equivalent here) a judgment in ejectment. Where a party is *prima facie* the owner of land in his own right, and is to be turned into a trustee by matter of evidence, all presumptions are against him who alleges himself to be *cestui que trust*, and if he withholds his evidence until it becomes obscure and unintelligible, he must bear the consequences of his own default.

This, then, is the case of an ejectment, brought as a substitute for a bill in equity, to declare the holders of the legal title trustees of Benson, and to compel the execution of the trust: *Peebles v. Reading*, 8 Serg. & R. 484; *Jackman v. Ringland*, 4 Watts & S. 149. The transaction supposed to be set forth in the bill as the origin of the trust was doubtful at first, if we

can be supposed to know anything about it from the evidence before us; it was fifty-two years old when the bill was filed, and there was no intermediate acknowledgment of the trust by one party, and no assertion of it by the other. A decree, in such a case, could not be pronounced in favor of the plaintiff, without running counter to all precedent. Courts of equity will not listen to claims so old that they would be barred at law by the statute of limitations. If this rule, which is in itself so just and wise, needed the authority of great names to support it, Lord Talbot: *Aggas v. Pickerell*, 3 Atk. 225; Lord Redesdale: *Underwood v. Courtown*, 2 Sch. & Lef. 71; Chief Justice Marshall: *Elmendorf v. Taylor*, 10 Wheat. 152; Chancellor Kent: *Demarest v. Wynkoop*, 3 Johns. Ch. 129 [8 Am. Dec. 467]; and Judge Story: 1 Eq. Jur. 529—ought to be sufficient for the purpose.

It follows, from what I have said, that where a warrant is issued to one person, and the purchase money is paid by another, and the patent is afterwards taken out by the nominal warrantee, the right of him who paid the purchase money is gone, unless he takes possession of the land or brings ejectment to recover it within twenty-one years from the date of the warrant; and after that lapse of time he can not recover, no matter how clearly he may be able to prove that the legal owner was in the beginning a trustee for him. In such cases, the maxim *Omnia præsumuntur rite esse acta*, is applied to the proceedings of the land office, and the presumption of law is conclusive against all rights which do not appear on the face of the commonwealth's grant. Evidence of purchase money paid by the plaintiff, as the groundwork of his title, ought to be rejected by the court, if the date of the payment be more than twenty-one years before suit brought, unless it be accompanied by an offer to prove such acknowledgments, on the part of the warrantee, as will take the case out of the rule here laid down. What acknowledgments would be sufficient for that purpose is a point not raised by this record.

When I say that the suit must be brought within twenty-one years from the date of the warrant, I speak of a case like the present one, in which the alleged trust is proved by the naked and solitary fact of the payment of purchase money. Where the *cestui que trust* has superintended the survey and paid the officer's fees, or exercised other acts of ownership over the land, the presumption in favor of the trustee would, perhaps, not begin to arise until he did some act of hostility, such as selling his title, or taking out a patent to himself.

We have come to this conclusion with the deliberation which was demanded by the interests of the present parties, the rights of those who claim under the numerous other warrants paid for by the same person, and the importance of the general question. The cause was twice argued with great ability, once before all the judges, and afterwards again, in the absence only of him whose death we have since been called to lament. From the first no member of the court felt that the judgment could be sustained, and all the survivors now concur in the opinion that its reversal is demanded alike by precedent and principle.

Judgment reversed, and *venire facias de novo.*

RESULTING TRUST MAY ARISE where one pays the purchase price of land and the deed is taken in another's name: *Jackson v. Miller*, 21 Am. Dec. 316; *Foote v. Colvin*, 3 Id. 478; *Denton v. McKenzie*, 1 Id. 664; *Hall v. Sprigg*, 12 Id. 506; *Jackson v. Morse*, 8 Id. 306; *Cuphill v. Isbell*, 19 Id. 675; *Depeyster v. Gould*, 29 Id. 723; *Padgett v. Lawrence*, 40 Id. 232, and the notes to above cases.

RESULTING TRUST FROM PURCHASE OF LAND MAY BE SHOWN BY PAROL: *Smitheal v. Gray*, 34 Am. Dec. 664.

APPLICATION OF STATUTE OF LIMITATIONS AND ITS OBSERVANCE IN COURTS OF EQUITY is discussed at length in *Perkins v. Cartmell*, 42 Am. Dec. 753, and cases referred to in note thereto. That courts of equity discountenance stale demands, laches, and neglect is well established, even in the absence of a statute of limitations: See *Perkins v. Cartmell*, 42 Id. 753; *Smith v. Thompson*, 54 Id. 126, and extensive note thereto; *West v. Thornton*, Id. 134; *Hudson v. Layton*, 48 Id. 167, and cases in note.

ADVERSE POSSESSION FOR TWENTY-ONE YEARS is conclusive as to title in the person adversely holding: *Brown v. McKinney*, 36 Am. Dec. 139. So an adverse holding for twenty years will bar ejectment: *Berthelemy v. Johnson*, 38 Id. 179; see the notes to those cases, where others are collected. That an easement may be acquired by an adverse user of twenty-one years, see *French v. Marstin*, *ante*, p. 294, and note.

THE PRINCIPAL CASE IS CITED AND AFFIRMED in *McBarron v. Glass*, 30 Pa. St. 133, to the point involved in the last subdivision of the syllabus.

LANCASTER BANK v. WOODWARD.

[18 PENNSYLVANIA STATE, 357.]

PAYMENT OF CHECK TO PARTY HOLDING IT one day before it becomes due, and before it has been presented to the bank upon which it was drawn, destroys its negotiability and value forever.

CHECKS ARE NOT AS HIGH EVIDENCE OF INDEBTEDNESS AS NOTES, but are equally subject to the rule that when taken up or paid after the day in the check specified, they are subject to all intervening considerations which would affect them between the original parties.

ABSENCE OF DEPOSIT IN BANK TO CREDIT OF DRAWER OF CHECK is sufficient notice to such bank not to pay the check.

PRACTICE OF PAYING OVERDRAFTS, even to persons in good standing with the bank, has no authority in sound usage or in law.

ORDINARILY IT IS QUESTION OF FACT WHAT IS REASONABLE TIME within which to present a check for payment, but in cases of great negligence, such as paying a check over a year after it is made payable, without inquiry, the court is justified in instructing the jury that the plaintiff should not recover.

Assumpsit upon a check, of which the following is a copy:

“ LANCASTER, December 14, 1848.

“ Lancaster Bank pay to Samuel Hunt or order, on the fourteenth of January, 1849, six hundred dollars.

“ \$600.

SAMUEL W. WOODWARD.”

One day before this check became due, Woodward sent the sum of six hundred dollars to the payee, Hunt, at his residence, and instructed his messenger to procure a return of the check. The messenger, one Zell, paid the money to Hunt, and asked him for the check. Hunt put his hand in his pocket, said he could not find it; had left it at his house, but would give it to Woodward next week. Zell saw Woodward a few days later and told him what he had done. Hunt did not deliver the check to Woodward, but about a year later, in January, 1850, delivered it to the Penn Township Bank to be collected. The cashier of the Penn Township Bank forwarded it immediately to the Lancaster Bank, and two days later it was paid by the latter bank, by charging it to the account of Woodward. At this time Woodward had but thirteen dollars and eighty-six cents on deposit in the Lancaster Bank. At the trial the bank attempted to establish a usage and practice to pay checks at some time after they became due, and to pay checks of customers who had no funds to their credit. The lower court instructed the jury in substance to find for defendants.

Hiesler and Champneys, for the plaintiff.

Fraser and Reed, for the defendant.

By Court, WOODWARD, J. The defendant in error having paid his check to the holder of it, the day before the time appointed for its payment, the negotiability and the value of the instrument were gone for ever. As he had no funds in the Lancaster Bank when he drew the check, he was bound to place them there before it became payable, or pay the amount directly to the holder. He chose to do the last; and no possible exception can

be taken to his choice. He ought, indeed, to have required his check to be delivered to him on paying the amount, and it would seem his agent, by whom he sent the money, did demand it; but Hunt alleged that he had it not with him at the place where the payment was made, and promised to deliver it to Mr. Woodward the next week. The check was not delivered up as it should have been, but the payment of it extinguished all liability of Woodward on account of it. More than a year after the time appointed for its payment, and after its actual payment, the Lancaster Bank received it from the Penn Township Bank; and after two days' delay, paid it to the Penn Township Bank, or, what is the same, placed it to their credit on their books; and now the Lancaster Bank claims to have been an innocent indorsee without notice. Had it been a negotiable note, there can be no doubt an indorsee would have taken it at his peril. The indorsee of overdue paper takes it exclusively on the credit of the indorser, and subject, even without *mala fides*, to all the intrinsic considerations that would affect it between the original parties: *Snyder v. Riley*, 6 Pa. St. 164 [47 Am. Dec. 452]. But a note is much higher evidence of indebtedness than a check. Indeed, a check, of itself, is not evidence of a debt or loan of money. The presumption is that it was given in payment of a debt, or that cash was given for it at the time: *Flemming v. McClain*, 13 Id. 178. Checks are no doubt often negligently retained, and presented long after they should be; but when a bank sees that a customer appointed a day in his check for its payment, that that day has long since passed, and that no funds have been deposited to meet it, the bank must be held to the rule in regard to other overdue paper, and be presumed to have taken it on the credit of the indorser. These circumstances are sufficient to put the bank on inquiry, and therefore they are not to be regarded as innocent indorsees without notice.

But the bank attempts to justify itself in paying this overdue check, when the drawer had no funds in its vaults, on the ground that he was a customer in good credit, and had given no notice to them that it had been paid. The absence of deposits was a sufficient notice to them not to pay the check, for checks are always supposed to be drawn on a previous deposit of funds: Story on Prom. Notes, 641. In *Fletcher v. Manning*, 12 Mee. & W. 571, it was held that a check presented and paid is no evidence of money lent or advanced by the banker to the customer. On the contrary, it is *prima facie* evidence of the repayment to the amount of the check by the banker to the cus-

tomer of money previously lodged by the customer in the banker's hands.

Such is the usual course of business, and the very wide departure from it by the Lancaster Bank, in paying this overdue check out of other funds than those of the drawer, can not be justified. It was attempted to prove a custom to pay overdrafts of solvent dealers with banks, but it failed; and if it had not failed, such a custom should be abolished. *Malus usus abolen-dus est.* Our banking institutions are generally conducted by boards of directors, to whom stockholders look for the proper use and management of the capital invested; whilst the ordinary routine of daily business is intrusted to cashiers and clerks, who are not directors, generally not stockholders, and who have no power to discount paper. If these subordinate officers might pay checks, which are properly drafts on funds deposited, when there were no funds of the drawer on deposit, the capital of banks would be liable to perversion to purposes and in modes that were never contemplated, either by the legislature or the stockholders. That the practice of paying overdrafts has prevailed to some extent is quite likely; and it may be true that boards of directors have in some instances sanctioned it; but it has no authority in sound usage or in law. The more nearly these institutions keep in the line of regular business transactions, the more effectually will they accommodate the public and secure their own interests.

In the case before us, the Lancaster Bank was informed by its own books that the defendant had no funds on deposit out of which to pay the check, and the bank possessed no other funds out of which it had a right to pay it.

As to the complaint that the court withdrew the cause from the jury, it is enough to say, that upon the facts before them, they were fully justified in asserting, as matter of law, that the plaintiff was not entitled to recover. It is true, that in *Rothschild v. Corney*, 9 Barn. & Cress. 388, it was left to the jury to determine whether the defendants had taken a check six days old, under circumstances which ought to have excited the suspicions of prudent men. In Byles on Bills, p. 175, it is laid down, on the authority of a great number of English cases, that bills and notes and checks, payable on demand, must be presented within a reasonable time; and that what is a reasonable time seems to be a question of law. Other authorities treat it as a question of fact, and this is perhaps the better opinion as to ordinary cases; but the delay in this case was so great, and the

conduct of the bank was so grossly negligent in paying a check so long overdue, without deposits of the drawer, and without inquiry, that we think the learned judge was entirely right in giving the jury the instructions he did.

The judgment is affirmed.

NOTICE OF DISHONOR OR CHECK need not be given to a drawer who had no funds in the bank at the time the check was payable: *Peck v. Thomas*, 51 Am. Dec. 135.

HOLDER OR CHECK IS BOUND TO USE DUE DILIGENCE in obtaining the money, and must present it and demand payment within a reasonable time: *Cruger v. Armstrong*, 2 Am. Dec. 127; *Smith v. Jones*, 32 Id. 527, and note. The time within which a check should be presented for payment is discussed in this latter case.

PATTERSON v. TODD & LEMON.

[18 PENNSYLVANIA STATE, 426.]

INDORSER OF PROMISSORY NOTE may be considered as the drawer of a bill of exchange upon the maker thereof.

INDORSEMENT OF NOTE OVERDUE IS EQUIVALENT TO DRAWING NEW BILL OF EXCHANGE, payable at sight, upon which the indorser is liable only upon proof of a demand upon the maker, and notice of his failure to pay. Such indorsement is not a new note.

NOTE OVERDUE AND NOTE PAYABLE ON DEMAND are in legal effect the same.

BY PAROL EVIDENCE, CONTRACT OF INDORSEMENT may be converted into an absolute and unconditional promise to pay, or to mean nothing further than the transfer of the note without recourse.

ERROR to the common pleas of Blair county. Action upon a promissory note made to George W. Patterson by John S. Wilt, dated December 16, 1841, and indorsed by G. W. Patterson, and afterwards, on June 1, 1842, assigned by Todd & Lemon to William K. Piper. At the trial, John Piper testified that he was present when Patterson gave the above-described note to William Barr in part payment for a horse. The note had been due a few days at that time. He believed the note was indorsed by Patterson at the time it was offered. Some time after, the note came into the possession of Todd & Lemon; they gave it to William K. Piper for a horse. John S. Wilt, the drawer of the note, said that he had never been called upon to pay the note to his recollection; that he could have paid it in the spring of 1842; that he had since become insolvent. A. Smith testified that at the time of the horse trade between Patterson and Barr, Barr did not like to take the note unless Patterson would guarantee it; that Pat-

terson refused to guarantee it, and that Barr afterwards agreed to his terms, and took the note. The court instructed the jury *inter alia*: "The claim is upon the alleged indorsement, and the plaintiffs must recover upon that indorsement, if at all; they do not claim, and can not claim, to recover in their name, on any guaranty given by Patterson to Barr. Was the note indorsed by Patterson, and indorsed after due? This is a question of fact for you. If it was, it thence went into circulation on the credit of the indorser. Such indorsement is to be considered as the making of a new note, and imposing on the indorser the primary obligation of a drawer; and to charge him, demand and notice need not be shown. If Patterson indorsed the note after it was due, then the plaintiffs are therefore entitled to a verdict for its amount, with interest; otherwise they are not. The question of fact is for you." Verdict for plaintiff. Plaintiff in error now relies upon the instructions of the court for a reversal of the judgment.

Calvin, for the plaintiff in error.

Blair, for the defendants in error.

By Court, Lewis, J. The questions for decision in this case have relation to the effect of indorsing a promissory note overdue. 1. What is the contract which the law implies from such an indorsement? 2. Is the implied contract subject to modification by parol evidence of the special agreement made by the parties at the time of the transaction? In 1816, Chief Justice Parker, in *Field v. Nickerson*, 13 Mass. 131, considered it remarkable that the law on so familiar a contract as the indorsement of a note on demand should at that late period be doubtful; and it is certainly to be regretted that on a kindred, if not the identical, question, it remains in the same condition in Pennsylvania.

The law of bills of exchange seems to be well understood. Every business man knows that when he receives an inland bill of exchange, it is his duty to present it for payment at maturity, if payable at a particular time; or within a reasonable time, if payable at sight; and in either case, to give immediate notice to the drawer, if the bill be dishonored. If these duties be neglected by the holder, the drawer is, in general, discharged from all further liability on the bill. It is also well understood, among the learned and unlearned, that the rules of the law merchant which regulate the liabilities of the parties on bills of exchange apply also to the indorsement of promissory notes.

The indorser of a note is considered as the drawer of a bill of exchange upon the maker, and the body of the note is referred to for the purpose of showing the sum to be paid, the time and place of payment, and the fact that the bill is already accepted by the maker of the note, whose signature thereto places him, as between the indorsee and himself, in the condition of a drawee of a bill of exchange, after acceptance. Where a note is indorsed before it is due, the holder must present it for payment at maturity, and in case of default, must give immediate notice of the dishonor. But after the note becomes due, it is payable whenever the holder chooses to demand it, and for this purpose an action at law is a sufficient demand, as between the maker and holder. Like a contract for the payment of money, where no time of payment is specified, it is legally payable presently. So that when such a note is indorsed, the indorser still stands in the condition of the drawer of an inland bill of exchange; and we refer to the note, as before, for the purpose of ascertaining the amount, and the time and place of payment. The time of payment having passed, the note is, in law, payable on demand, and this shows that the indorsement is to be considered as if made upon a new note payable on demand, and the legal effect of it is precisely the same as if the indorser had drawn an inland bill of exchange upon the maker, payable at sight. It is the duty of the holder of such a bill to present it for payment within a reasonable time, and if the bill be dishonored, to give immediate notice thereof to the drawer. In the case of an indorsement of a note overdue, the holder is, in like manner, bound to present it for payment within a reasonable time; and in case of non-payment, to give immediate notice of the dishonor to the indorser, otherwise the latter is discharged from liability. This doctrine is fully sustained by the authorities.

It is stated in Ch. Bills, 15, 16, that a bill may legally be indorsed after it is due and has been dishonored, but not after it has been paid by the acceptor: *Mutford v. Walcot*, 1 Ld. Raym. 575; *Dehers v. Harriot*, 1 Show. 163; *Callow v. Lawrence*, 3 Mau. & Sel. 97; *Bacon v. Searles*, 1 H. Black. 89; *Hubbard v. Jackson*, 1 Moo. & P. 11; and that a bill indorsed after due is equivalent to drawing a new bill payable at sight: *Dwight v. Emerson*, 2 N. H. 159; *Rugely v. Davidson*, 2 Mill Const. 33. But there is this distinction between notes, etc., indorsed after and before due, that in the first case the holder takes them subject to all the defenses to which they were subject in the hands of

the original parties: Ch. Bills, 15, 16. It may fairly be inferred from Mr. Chitty's statement of the distinction between indorsements of bills after due and before due, that the only difference is that in the first case the holder takes them subject to all the equities which existed between the original parties; and in the last case, he takes them discharged of all such defenses.

That the indorsement of a note overdue is equivalent to drawing a new bill payable at sight, upon which the indorser is liable only upon proof of a demand upon the maker within a reasonable time, and immediate notice of the default, is fully established by the following decisions made by the highest courts of our sister states, and pronounced by judges whose learning and experience in this particular branch of the law entitle their opinions to the highest regard: *Poole v. Tolleson*, 1 McCord, 199 [10 Am. Dec. 663]; *Ecfert v. Des Coudres*, 1 Mill Const. 70 [12 Am. Dec. 609]; *Course v. Shackleford*, 2 Nott & M. 283; *Bishop v. Dexter*, 2 Conn. 419; *Field v. Nickerson*, 13 Mass. 131; *Colt v. Barnard*, 18 Pick. 260 [29 Am. Dec. 584]; *Berry v. Robinson*, 9 Johns. 121 [6 Am. Dec. 267]; *Agan v. McManus*, 11 Id. 180; *Leavitt v. Putnam*, 3 N. Y. 494 [53 Am. Dec. 322]; S. C., 1 Sandf. 199; *McKinney v. Crawford*, 8 Serg. & R. 353; *Brenzer v. Wightman*, 7 Watts & S. 265.

The cases which are supposed to conflict with this view of the subject, and to sustain the position that the contract of indorsement, when made upon a note overdue, changes its character, and becomes an original and unconditional engagement to pay the amount, are: *Brown v. Davies*, 3 T. R. 80; *Bank of North America v. Barriere*, 1 Yeates, 360; *Leidy v. Tammany*, 9 Watts, 353; and *Jordan v. Hurst*, 12 Pa. St. 269. In *Brown v. Davies*, the only question was whether the maker, in an action against him by an indorsee, could be permitted to prove a payment to the payee before the indorsement. No question touching the liability of the indorser arose in the cause, or was decided by the court; and the misapprehension which has since occurred in relation to some of the loose remarks of one of the judges on a question to which his attention was not drawn, and on which he did not feel called upon to speak with precision, shows the danger of relying upon such *obiter dicta* as authority for anything. The case of the *Bank v. Barriere*, 1 Yeates, 360, was decided by a single judge, upon its own special circumstances, and has not only been so explained and understood, but it was solemnly decided by this court, nearly thirty years ago, that it furnished no authority for the doctrine that the conditional

contract of indorsement may be tortured into an original unconditional engagement: *McKinney v. Crawford*, 8 Serg. & R. 351.

The case of *Leidy v. Tammany*, 9 Watts, 353, like that of *Bank of North America v. Barriere*, 1 Yeates, 360, was properly decided upon its special circumstances; and the observations of the judge, in going further than the case required, must not be received to unsettle the established rules of law. There are other cases in which the erroneous idea that an indorsement of a note overdue is a new note seems to float in the minds of the judges; but the error arises from a want of precision in the language used in some of the early cases. When it was intended to say that such an indorsement was a new bill, payable at sight, the judge has been erroneously supposed to mean a new note, payable on demand. The difference is so manifest as to need no explanation. In *Jordan v. Hurst*, 12 Pa. St. 269, a demand was made upon the maker of the note on the fourth day after the indorsement, and it was stated in the case "that the drawer [of the note] had no property or effects out of which the debt could be levied." There was no complaint of a want of diligence in making demand upon the maker of the note, and we do not propose to inquire into the propriety of the decision that his insolvency dispensed with the necessity of notice to the indorser. But it can not be denied that the observations of the judge who delivered the opinion of this court in that case had a tendency to mislead the intelligent and excellent president who decided this cause in the court below. The observations of Mr. Justice Coulter lose much of their weight, however, when it is remembered that they extended to a question not necessarily arising in the case, that they are founded chiefly upon the cases already explained as not sustaining the position that an indorsement of a note overdue is a new note, and that the learned judge himself virtually abandons the position when he concedes that the action against the indorser can only be sustained "after the original maker of the note has refused payment." This implies the necessity of a demand upon the maker, which is altogether repugnant to the idea that the indorsement is a new note.

The interrogatories of Mr. Justice Duncan, in *McKinney v. Crawford*, 8 Serg. & R. 353, have never been satisfactorily answered by those who desire to convert an indorsement into an absolute and unconditional engagement to pay the amount: "If it was a contract of absolute and immediate liability, why indorse? For what purpose draw? Why not give his own

note?" Id. We fully adopt the language of Mr. Justice Duncan in the case last cited, in which he declares that "it is now a doctrine well settled, that in the case of all notes, whether overdue or not, to render the indorser liable, there must be a demand on the maker and notice to the indorser, unless a contract of a different nature from that of indorsement is to be implied from the special circumstances and the understanding of the parties at the time of the transaction:" *McKinney v. Crawford*, Id. 357. A note overdue and a note payable on demand are, in legal effect, identical, and therefore the decision in *McKinney v. Crawford* is a direct decision on the question involved in this case.

We have seen that the contract of indorsement may be converted by parol evidence into an absolute and unconditional engagement to pay the amount: *Bank of North America v. Barriere*, 1 Yeates, 360; *Leidy v. Tammany*, 9 Watts, 353. It follows that it may be explained, by the same kind of evidence, to mean nothing further than a transfer of the debt, without recourse to the indorser. The evidence on this part of the case ought to be submitted to the jury, if the plaintiff, on another trial, by the proof of demand and notice should establish a *prima facie* title to recover. But in the absence of evidence of a demand upon the maker of a note and notice to the indorser, the instructions given by the court below were erroneous. The instruction ought to have been given that the plaintiffs were not entitled to recover.

Judgment reversed, and *venire de novo* awarded.

NOTE INDORSED AFTER MATURITY, in its legal effect, as between indorser and indorsee, becomes an inland bill of exchange, payable on demand: *Jones v. Robinson*, 54 Am. Dec. 212, and note. Such a note between the indorsees and maker remains a note payable on demand: Id.; *Daniel on Neg. Inst.*, sec. 611.

PAROL EVIDENCE TO EXPLAIN OR VARY INDORSEMENT.—This subject is discussed at length in note to *Hill v. Ely*, 9 Am. Dec. 376; see also *Perkins v. Callin*, 29 Id. 282, and *Hall v. Newcomb*, 42 Id. 82, where other cases are collected in notes.

THE PRINCIPAL CASE IS CITED in *Ross v. Espy*, 66 Pa. St. 481, to sustain the point that evidence is admissible to show that at the time of an indorsement of a note the first and second indorsers agreed that in case of loss they should bear it jointly.

HOLLIDAY v. RHEEM.

[18 PENNSYLVANIA STATE, 465.]

PATENT MAY BE VALID, although some parts of the machine described were not the original invention of the patentee.

If ANYTHING BE INCLUDED IN PATENT WHICH IS NOT NEW, or if the patent covers any material or substantial part of a machine which the patentee did not invent or discover, the patent is void.

VALID PATENT MAY BE OBTAINED UPON NEW COMBINATION of existing principles or machines.

ONE WHO OBTAINS PATENT UPON Two APPLIANCES UPON WATER-WHEEL, when said patent is attacked, must show that each of said appliances is new, or his patent is void.

INSTRUCTION THAT IF THERE IS ANYTHING NEW IN INVENTION a patent obtained upon it is valid, is erroneous.

In ABSENCE OF PRAYER FOR SPECIFIC INSTRUCTION, the silence of the judge is no error.

ERROR to the common pleas of Cumberland county. This is an action upon a promissory note, the consideration of which was the patent right to a water-wheel obtained by one Howd. The plaintiff admitted this fact, also that the note was negotiated after maturity. The facts appear from the opinion.

Penrose and Biddle, for the plaintiff in error.

Todd, for the defendant in error.

By Court, Black, C. J. This suit was brought on a note which the defendant below had given the plaintiff for the price of a patent right for Howd's water-wheel. The defense was that the patent was void, having been obtained by Howd, the patentee, for an alleged improvement which was in fact not his invention, but had been known and in use before his pretended discovery of it. The court instructed the jury that this defense, if established, would entitle the defendant to a verdict; and the whole controversy, therefore, was properly made to turn on the validity of the patent.

The act of congress requires the inventor, before he shall receive a patent, to describe his invention, and to specify and point out the part and improvement, or combination, which he claims as his own invention. In the present case, Howd, the patentee, described in the schedule the wheel, as improved by himself, the mode of its construction, the materials of which it was composed, and the principles of its operation; and concluded by pointing out particularly what he claimed as his invention. This description is said to be obscure; but it is intel-

ligible enough to show very clearly that Howd did not claim the whole wheel as his invention, but only a part of it, which he alleged was a new and useful improvement upon an old wheel known before.

When this case was here on a former writ of error: *Rheem v. Holliday*, 16 Pa. St. 347, it was held that the patent was not to be adjudged void merely because every part of the whole wheel, as described in the schedule, was not the original invention of the patentee. This opinion has our fullest assent. It is certainly not necessary to the validity of the patent that those parts should be new which the patentee admits to be old; and he does admit everything to be old which he does not claim as new. It is for the parts claimed as his own invention, and as such particularly pointed out, that the patent is issued. It covers no more; and he is not bound to prove the originality of what is not in it, to make it a protection for what is in it.

Another plain deduction from this specification is, that the patentee claims as his invention more than one improvement of the water-wheel; or, more properly speaking, an improvement capable of being divided into several parts, which might have been invented at different times and by different persons. "The application of the water upon the outside of the wheel, and operating upon the principle of reaction," might be the invention of one man; while "the spouts, or chutes, giving the water a direction with the motion of the wheel," might have been discovered by another. Since, then, one of these constituent portions of the improvement patented might be new and another old, the claim of originality may, in its nature, be partly true and partly false. Supposing it to be so, is the patent void? or is it to be held valid and good, because one part of the invention is really original, though it covers other things to which the patentee has no just claim?

This is not a new question. The federal courts have often had it before them. It has been discussed and decided in the circuit court of Massachusetts: *Whittemore v. Cutler*, 1 Gall. 480; *Lowell v. Lewis*, 1 Mason, 188; *Barrett v. Hall*, Id. 447; *Moody v. Fiske*, 2 Id. 112; in the circuit court of Pennsylvania: *Evans v. Hellick*, 3 Wash. (U. S.) 425; and in the supreme court of the United States: *Evans v. Eaton*, 3 Wheat. 454; and it has been uniformly held that if anything be included in a patent which is not new, the patent is void. If what is new be mixed with what is old, the patent is no protection for either. It is a fatal objection to a patent that it covers any substantial or

material part of a machine which the patentee did not invent or discover.

There is, it is true, a certain sense in which it is not necessary that any part of a patented machine should be new. Old materials, or old principles, may be used in combination, so as to produce a new result: *Pennock v. Dialogue*, 4 Wash. (U. S.) 543, and the novelty of the effect makes it a new machine. In this sense, it may be said that there is nothing new under the sun; for the simple elements of all mechanical power are as old as the earth. It is a new combination of these original principles that makes any invention new. A patent may be obtained, not only for a new arrangement of elementary principles, but for a new combination of two or more existing machines. In such a case, the patent must stand upon the combination only, and the patentee can have no exclusive right to the separate machines: *Moody v. Fiske*, 2 Mason, 117. But this patent does not stand upon a combination. Howd claimed the application of the water on the outside of the wheel as his invention, and also the spouts, or chutes, not because they form together a new combination, but because each one of these things is, in itself, new. He asserts that both are his original inventions; and if the assertion be untrue with respect to either, or to any essential part of either, his patent is wholly void.

It is possible that when the judge below submitted it to the jury to say whether there was anything new in Howd's claim, he meant to speak of it as a unit, and to say that it was valid if it was new in any degree. But looking at the charge, without the least disposition to be hypercritical, we can not give it that construction. On the contrary, we think the natural and obvious meaning of the words is, that if any part of what the patentee claimed as his invention was new, the plaintiff might recover. He adopts the plaintiff's fifth point by answering it in the affirmative, and in effect says, that if there is anything new or useful in Howd's wheel, either in the formation of the chutes, the manner in which the wheel is made, or the combination of the chutes and wheel, the patent is valid. This was dividing the asserted improvement into distinct parts, and submitting them, together with some other things not covered by the patent, to the jury to say, upon each of them separately, whether there was anything new in either, and directing a verdict for the plaintiff in case the affirmative was found. If this were the rule, the smallest modicum of originality would sanctify any amount of piracy on other men's rights. The per-

son who invented the steam-whistle might, upon this principle, have had a valid patent for the locomotive. But such is not the law. If the patentee's claim, as set forth by himself, was false, his patent was void; and if false in any material or substantial part, it is the same as if false throughout.

The other assignments of error have not been sustained. That one which complains that the court did not give a construction to the patentee's schedule and summary of his claim is especially destitute of force. Perhaps it needed a translation, and the judge would no doubt have furnished one, if he had been called on to do so. But, in the absence of a prayer for specific instructions, his silence was no error.

Judgment reversed, and *venire facias de novo* awarded.

WHAT NECESSARY TO CONSTITUTE VALID PATENT: See *Davis v. Bell*, 31 Am. Dec. 202, and note.

OMISSION TO GIVE INSTRUCTIONS that might have been proper, if asked, is not error, but only the giving wrong instructions, or the refusing right ones when asked: *State v. Scott*, 42 Am. Dec. 148; *Churchman v. Smith*, 36 Id. 211; *Brittain v. Doylestown Bank*, 39 Id. 110, and note. The above rule is well established in Pennsylvania: See *Wertz v. May*, 21 Pa. St. 274; *Huber v. Wilson*, 23 Id. 178; *Raush v. Miller*, 24 Id. 277; *Storch v. Carr*, 28 Id. 135; *Weamer v. Juari*, 29 Id. 257; *Newman v. Edwards*, 34 Id. 32; *Deen v. Herrold*, 37 Id. 150; *Bain v. Doran*, 54 Id. 124; *Walker v. Humbert*, 55 Id. 407; *Davis v. Bigler*, 62 Id. 242; *Cooper v. Altimus*, Id. 486; *Arthurs v. Bascomb*, 28 Leg. Int. 284; *Neely v. Merrick*, 7 Phila. 170.

GINGRICH v. FOLTZ.

[19 PENNSYLVANIA STATE, 38.]

RECITALS IN PATENT ARE NOT EVIDENCE AGAINST ONE HOLDING BY SETTLEMENT, or other right prior to the date of the patent, although they are evidence against one who relies on possession alone, and shows no title, or who claims under improvements or other rights arising subsequently to the date of the patent.

PURCHASER OF LAND UNDER PATENT IS BOUND TO TAKE NOTICE of the chain of conveyances which authorizes the commonwealth to grant her remaining title to the patentee.

PURCHASER OF LAND AT EXECUTION SALE ACQUIRES SUCH TITLE only as the execution debtor had.

EJECTMENT by Catharine Foltz against Cover and Gingrich. John Reesor, who died in 1799, directed that a legacy bequeathed by him to his daughter Barbara Evich should be invested in the purchase of a tract of land to be held by her during her life and to go to her children after her death. The

executors of John Reesor executed to Barbara Evich a deed of the tract of land in question in 1828, granting the same to her "during her natural life, and after her death to the use of the heirs of her body and their heirs and assigns forever." This deed was not recorded. In 1828 a patent to this tract was granted by the commonwealth to Barbara Evich, but by whom it was obtained did not appear on the trial. It was recited in the patent that "said tract was surveyed in pursuance of a warrant dated the fourth of June, 1752, granted to said Henry Fox, whose right in and to said part, by virtue of sundry conveyances and other assurances in law, became vested in the said Barbara Evich, to have and to hold the said tract of land, with the appurtenances, unto the said Barbara Evich and her heirs to the use of her, the said Barbara Evich, her heirs and assigns forever." In 1832 the sheriff sold the land in dispute under an execution issued upon a judgment previously obtained against Barbara Evich, and the defendants are the successors in interest of the purchaser at that sale. One or other of the purchasers was in possession from the date of the sheriff's sale until the commencement of this action, in December, 1848. No notice was given at the sale that Barbara Evich had only a life estate in the land. The plaintiff was the daughter of Barbara Evich. Verdict for the plaintiff.

Fisher, for the plaintiff in error.

Alricks, for the defendant in error.

By Court, Lewis, J. In Pennsylvania a warrant and survey, attended with payment of the purchase money, is to be considered, as against all but the commonwealth, in the same light as the legal estate in England, and is not to be distinguished, as to the mode of conveying, entailing, and barring entails, from estates strictly legal: *Burkart v. Bucher*, 2 Binn. 455 [4 Am. Dec. 457]; *Duer v. Boyd*, 1 Serg. & R. 203; *Caines v. Grant*, 5 Binn. 120; *Maclay v. Work*, Id. 158. A patent is only *prima facie* evidence of title: *Bixler v. Baker*, 4 Id. 213; *James v. Bets*, 2 Id. 12. The patentee is a trustee for the right owner: *Duer v. Boyd*, *supra*. It has been the custom to suffer the validity of a patent to be contested, and the question generally is, not who has got the patent, but who was entitled to it, on principles of law and equity, at the time it was issued: *Maclay v. Work*, 5 Id. 157. The recitals in a patent are evidence against one who relies on possession alone and shows no title: *Whitmire v. Napier*, 4 Serg. & R. 290; *Downing v. Gallagher*, 2 Id. 455.

They are also evidence against one who claims under improvement or other rights arising subsequently to the date of the patent: *Diggs v. Downing*, 4 Id. 348; *Ross v. Marcy*, 2 Penn. Law Jour. 76. But it is well settled that recitals in a patent are not evidence against one holding by settlement, or other right originating prior to the date of the patent: *Penrose v. Griffith*, 4 Binn. 231; *Bell v. Wetherell*, 2 Serg. & R. 350; *Stewart v. Butler*, Id. 382; *Bonner v. Devenbaugh*, 3 Binn. 175; *Irwin v. Bear*, 4 Yelv. 262.

If the recitals in a patent are not evidence at all against one who derives title under the commonwealth prior to its date, it is difficult to understand how those recitals can be relied upon as conclusive against such a title. If the warrant, survey, and payment of the purchase money constitute the legal title, it is impossible to comprehend how the commonwealth can, by any act whatever, after she has parted with that title, prejudice, much less extinguish it. And when the patent itself bears on its face the evidence that the land had been previously sold to another (the warrantee), it is repugnant to the principles which regulate the rights and duties of vendees to hold that the latter are discharged from the duty of seeing, at their peril, that the title has been regularly conveyed from the warrantee to the patentee. On the contrary, it was held, at an early period, that the purchaser under a deed reciting a patent is bound to take notice of the title referred to in the patent: *Burkart v. Bucher*, 2 Binn. 455 [4 Am. Dec. 457]. And it has been repeatedly decided that it is not the law of Pennsylvania that by obtaining a patent, and selling to a purchaser for a valuable consideration, without notice, all inquiry as to adverse claims, founded on equities arising previous to the patent, is precluded: *Gonsalus v. Hoover*, 6 Serg. & R. 118; *Urkel v. Coryell*, 5 Watts & S. 60; *Burkart v. Bucher*, 2 Binn. 455 [4 Am. Dec. 457].

In the case last cited the patent was granted in fee simple to one who held only an estate tail under a will. There was also a sheriff's sale of the title of the patentee. In these particulars the case resembles the one now before us. It is clear that it can make no difference whether the title papers deducing the right from the warrantee are referred to in particular or in general terms. In either case the purchaser under the patent is bound to take notice of the chain of conveyances which authorize the commonwealth to grant her remaining title to the patentee.

In this case the purchaser of the title of Barbara Ewich was bound

to take notice of the conveyances referred to in the patent, as vesting in her the title previously granted by the commonwealth to Henry Fox. The purchaser necessarily claims under those conveyances, and holds only such title as upon the face of them appears to have been vested in Barbara Evich. As this was but a life estate, the plaintiff below, who is entitled in remainder, was properly permitted to recover.

This view of the case renders it unnecessary to consider the errors assigned, as they are not material to a correct decision upon the rights of the parties. The plaintiff in error sustained no injury by means of the matters therein set forth.

Judgment affirmed.

PARTY WILL BE CHARGED WITH NOTICE of contents and effect of instrument which affects the land conveyed to him, when: See *Price v. McDonald*, 54 Am. Dec. 657, note 667, where other cases are collected. A purchaser at sheriff's sale is affected by the records and the state of possession at the time when the sale takes place: *McBane v. Wilson*, 8 Fed. Rep. 737, citing the principal case.

NOTICE BY RECITALS OR REFERENCES IN DEEDS: See *Childs v. Clark*, 49 Am. Dec. 164, note 170, where other cases are collected.

PURCHASER ACQUIRES WHATEVER POSSESSION DEFENDANT IN EXECUTION HAD, and is entitled to recover it in an action of ejectment: *Den ex dem. Lyerly v. Wheeler*, 53 Am. Dec. 414.

RECITALS IN DEEDS AS EVIDENCE: See *Casey's Lessee v. Inloes*, 39 Am. Dec. 658, note 686; *Pruden v. Alden*, 34 Id. 51. It was decided in *Hull v. Campbell*, 56 Pa. St. 156, citing the principal case, that recitals in a patent are evidence against one who claims under rights acquired subsequent to its date.

SCHRIVER v. MEYER.

[19 PENNSYLVANIA STATE, 87.]

INTRODUCTORY WORDS IN WILL ARE TO BE CONSIDERED in order to ascertain the intention of the testator. And where a testator, who has no other real estate, in the introduction to his will uses the words "as to such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner," and then goes on to give, devise, and bequeath unto his wife a portion of his plantation, providing that the residue of the plantation be divided among his brothers and sisters, the widow will take a fee in the land devised to her.

EJECTMENT brought by Meyer against Schriver and others. The case depended on the construction of the will referred to in the opinion. The other facts appear from the opinion.

Evans and Mayer, for the plaintiffs in error.

Campbell and Potts, for the defendant in error.

By Court, LOWRIE, J. So far as relates to the intent of the devising clause, this will was disposed of in a former opinion of this court in one sentence, and the remainder of the opinion was devoted to a clause which is entirely unimportant. The true point of this case is thus dismissed: "As to the common introductory words, it is enough to say there is nothing in particular to which they can attach; and it has long been held that they are inoperative by themselves." It is with most sincere reluctance that we find ourselves constrained to declare that this conclusion of our predecessors is opposed to the whole current of Pennsylvania decisions, and would in almost all similar instances frustrate the manifest intent of the testator.

As in the case of *Harper v. Blean*, 3 Watts, 471 [27 Am. Dec. 367], this testator "had no other real estate than that described in the will. He had no issue, but left his wife surviving. He left also a brother and sisters, under whose right the plaintiff claims." Nearly his whole fortune was the result of the efforts of himself and wife, and he had no intimacy with his brother and sisters, most of whom lived at a distance from him. Under such circumstances, it would not have been unreasonable if he had given all he had to his wife; and certainly common justice would declare her claim to stand much higher than those of the brother and sisters.

But we may set aside all this, except the fact that he had no other land than that described in the will, and construe this will without the aid of any other extraneous circumstances. It sets out with the usual introduction, then directs as to his burial, and then says: "As to such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same in the following manner." Then he directs payment of his debts, and then gives a particular part of his plantation to his wife, and the rest to his brother and sisters.

In the case of *Weidman v. Maish*, 16 Pa. St. 504, this devise to the wife was held to create but a life estate, and we know of no similar decision in our books, except the case of *Steel v. Thompson*, 14 Serg. & R. 88, which is an exceptional case, in opposition to prior ones, attempting to overrule one of them, *French v. McIlhenny*, 2 Binn. 13, decided by a majority of the court against a strong dissent, and never since received as law, so far as we know.

The words "as to such worldly estate," etc., if they have nothing to which they can attach, must of course be inoperative. Here, however, they are most distinctly attached to the words

"I devise the same," etc. What follows, then, is most plainly a specification of the manner in which his "estate" is to be disposed of, and this brings the case explicitly within that large class of cases wherein the devise of the testator's "estate" is held to carry a fee, and the whole spirit of those decisions is violated by declaring this a life-estate.

In the case of *Busby v. Busby*, 1 Dall. 226, it was declared that similar words, "unconnected with any particular devise, show an intention to dispose of his whole estate," and will help the interpretation in case of doubt.

In *Caldwell v. Ferguson*, 2 Yeates, 250; S. C., Id. 380, there were no words of inheritance, but a fee was raised by the words "touching such worldly estate, etc., I give the same in the following manner." And it was there declared that the general clause was connected with the rest of the will by the phrase, "I give the same."

In *Doughty v. Browne*, 4 Id. 179, the words were, "touching all my worldly effects, real and personal, I dispose thereof in the following manner;" and the court say that these words "fully evince his intention of disposing of all his property."

In *French v. McIlhenny*, 2 Binn. 13, "as for such estate, etc., I give the same in the following manner," were held sufficient to carry a fee without anything to aid them.

In *Cassell v. Cooke*, 8 Serg. & R. 289 [11 Am. Dec. 610], a somewhat similar introductory clause is used in aid of the construction, and the court say: "It is declared by the testator that he intends to dispose of all his worldly estate, out and out. This will not of itself be sufficient to give a fee; but it is always carried down to the devising clauses to show the intent." And the same principle runs through the case of *Campbell v. Carson*, 12 Id. 54, and going a little out of the order of time, the case of *Johnson v. Morton*, 10 Pa. St. 245.

In *McClure v. Douthill*, 3 Pa. St. 446, the words are, "as to my worldly estate, I dispose of it as follows," and then the testator gives his daughter a tract of land. The court say: "We ought to have done at first in regard to words of inheritance what our legislature has done at last, by declaring every devise to be a fee which is not specially restricted. The devise to the testator's daughter, therefore, was a fee even as the law then stood."

In *Miller v. Lynn*, 7 Pa. St. 443, the court, in speaking of similar words, say: "The words in the preamble make it apparent that he intended to dispose of his whole estate. Although, therefore, there are no words of limitation or perpetuity added to

the devise to the children, yet as there is no limitation over, we bring down the word 'estate' in the preamble, and connect it with the devise in order to effectuate the intent."

In *Peppard v. Deal*, 9 Pa. St. 140, speaking of a devise of a house, and the words "as to my worldly estate," the court say: "The language in the introduction is carried down to the devising clause to explain the intent."

In *Harden v. Hays*, 9 Pa. St. 151, the court say: "It is very evident from the introductory clause that the testator had no intention to die intestate; but that in this case, as in almost all others, he supposed he was devising his whole estate. Where the word 'estate' is coupled with a devise of real estate, it is uniformly held to be a fee simple; and this is carrying out the intention of the testator in ninety-nine cases out of a hundred." Here the word "estate" in the introduction was coupled with the devising clause exactly as in this case: "I give and devise the same as follows."

In *McCullough v. Gilmore*, 11 Pa. St. 370, even less definite language—"all my worldly substance and property shall be disposed of in the following manner"—was held to give a fee. "These words," say the court, "and the like of them are generally carried down into the corpus of the will to show that the testator meant to dispose of his whole interest in a particular devise, unless words are used which plainly indicate an intent to limit."

With such unquestionable authority for declaring that this devise conveys a fee simple to the testator's widow, it would be a waste of time to go over the decisions in England and in other states, and we content ourselves with a mere reference to some of them: *Denn v. Gaskin*, 2 Cowp. 657; *Loveacres v. Blight*, 1 Id. 355; *Frogmorton v. Holyday*, 3 Burr. 1618; *Kennon v. McRoberts*, 1 Wash. (Va.) 96 [1 Am. Dec. 428]; *Wyatt v. Sadler*, 1 Munf. 537; *Watson v. Powell*, 3 Call, 306; *Winchester v. Tilghman*, 1 Har. & M. 452; *Jackson v. Merrill*, 6 Johns. 191 [5 Am. Dec. 213]; *Fox v. Phelps*, 17 Wend. 393; S. C., 20 Id. 437; *Fogg v. Clark*, 1 N. H. 163; *Doe d. Franklin v. Harter*, 7 Blackf. 488.

It is among the oldest legal principles, that a devise of all one's estate carries a fee; and what else is this? If we shorten the devise, so as to make the sense more striking, it will stand as follows: As to all my worldly estate, I devise the same as follows: one farm to my wife, and the other to my brothers and sisters; or thus: I devise all my worldly estate as follows: my personal property and half of my plantation to my wife, and

the other half of my plantation to my brothers and sisters. In this form, can any one doubt its true interpretation?

It is really much more plainly a fee to each than in the cases of *Saylor v. Kocher*, 3 Watts & S. 163, where the devise was of all his "leasehold estate;" and *Harper v. Blean*, 3 Watts, 475 [27 Am. Dec. 367], where the effective words were, "with whatsoever is not named that I have any right or claim to in law or equity;" and *Dice v. Sheffer*, 3 Watts & S. 419, where the words "all what I have, both real and personal property," were declared equivalent to "all my estate." It is stronger than *Neide v. Neide*, 4 Rawle, 75, where the devise was, "I give to my son John my late purchase from Elizabeth Claxton, and also four acres of woodland, being in a corner," etc. How all this line of decisions was broken through in the case of *Weidman v. Maish*, 16 Pa. St. 504, we can not say, but must presume that it was inadvertently done in the crowd of business which presses upon this court, and which must occasion frequent mistakes. If they were intended to be overruled, they deserved, in their rejection, a much more ceremonious elegy than can be comprised in a single sentence; for great have been their merits, and much good have they done in the last seventy years.

The testator gives to his wife eighty-five acres of his plantation, and "the residue of his plantation" to his brother and sisters; but the plain and natural meaning of this is, not that he gives his wife a life estate in one part, and his brother and sisters a fee in the rest, and also in his wife's part after her death. This phrase in wills has not yet been cast in the molds of technical expression, and thus removed from the interpretation of common sense. It has still sufficient pliability to fall with ease into its appropriate place, and with its proper value in an instrument written in ordinary language. And so was a similar provision disposed of in the case of *Neide v. Neide*, 4 Rawle, 82.

But it is demanded of us that we shall follow the decision in *Weidman v. Maish*, *supra*, where this very devise has received a construction. And why must we follow it? If the law was totally misapplied in that case, where one forty-fourth part of this land was in controversy, must we therefore continue to misapply it as often as the other shares come up for discussion? Because we or our predecessors have wronged one man by our blunders, must we therefore wrong forty-three others for the sake of our own consistency?

If not thus, then on what principle can we do it? Not simply

because this very devise has been decided on; most certainly not. This would be presenting the former doctrine of recovery in a new aspect. One verdict and judgment are not conclusive, even in the very same interest and between the same parties; whereas this would make one verdict and judgment, as to one interest and one set of parties, conclusive as to all similar interests and as to other parties, even though not heard.

Does the doctrine of *stare decisis* hold us to conform to that decision? I trust that this doctrine shall never be held to mean that the last decision of a point is to be taken as the law of all future cases, right or wrong. Then indeed will the isolated blunders of this court be of far more force than an act of assembly, or a clause of the constitution; for they may invade the inviolability of contracts. This is certainly a new phase of the doctrine of *stare decisis* that is most suicidal in its results. It is setting aside the old doctrine and establishing a new one. It is a declaration that all courts of the last resort must have been in error every time they have acknowledged and set aside former errors, which has not been an unfrequent event. Nay, more: it is claiming for this court an infallibility that can have no result but the perpetuation of the most incompatible errors.

As I understand the doctrine, it is tersely expressed in the maxim, *Minime sunt mutanda quæ interpretationem certam semper habuerunt*; and is well qualified by that other one, *Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam*—both of which are used by Lord Coke, and derived from the Roman law. It is well explained in Lieber's Pol. Herm. 209: "In a free country, where a knowledge of the citizens' rights is all-important, a precedent in law, if correctly and clearly stated—this is an essential requisite—and if applied with discernment and with the final object of all law before our eyes, ought to have its full weight. If there has been a series of uniform decisions on the same point, they ought to have the force of law, because in this case they have become conclusive evidence of the law." And the same writer has well estimated the value of a mere decision when he says: "There is hardly such a thing as judge-made law, but only judge-spoken law. The doctrine pronounced to-day from a bench may indeed not be found in any law-book; but the judge has ascertained and declared the sense of the community as already evinced in its usages and habits of business. If he has not expressed it correctly, society will show its sovereign power; his decision will be reversed to-morrow, or corrected by statute:" 1 Pol. Ethics, 265.

The true doctrine on this subject was declared and acted upon by this court in *Geddis v. Hawk*, 1 Watts, 286, and *Cowden's Estate*, 1 Pa. St. 279, and is thus laid down by Chancellor Kent: "I wish not to be understood to press too strongly the doctrine of *stare decisis* when I recollect that there are a thousand cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it:" 1 Kent's Com., lect. 21.

Suppose that we now assert that a devise, such as this, does not convey a fee simple, what will be the consequence? First, we defeat the intention of this testator, and wrong his devisees. Then the cases of *McClure v. Douthitt*, *Miller v. Lynn*, *Peppard v. Deal*, *Harden v. Hays*, and *McCullough v. Gilmore*, *supra*, were all decided within a very few years on the opposite principle, and all these cases will claim the right to be reheard, and all the titles acquired on the faith of these decisions may be declared invalid. How many are the wills similarly worded which have never been heard of in court, because their construction has been considered settled by former decisions, it is impossible to tell. Certainly the law must be the same for all. We dare not say that the principle of this case shall be limited to this will, for that would be making the rights of parties depend on the will of the judge, and not on the law of the land. We can not do justice in this case without rejecting the decision of *Weidman v. Maish*, *supra*, and reversing this judgment.

Judgment reversed, and judgment for defendant below, with costs.

BLACK, C. J., and GIBSON, J., dissented.

FREE PASSES BY WILL, WHEN: See *Bell v. Scammon*, 41 Am. Dec. 706, note 714, where other cases are collected. In *Shinn v. Holmes*, 25 Pa. St. 144, it was held, citing the principal case, that where a testator introduces a devising clause in his will by a declaration that "touching all the rest of my

estate real or personal, I do give and dispose in the following manner," and there is no devise over, nor any language in the will indicating an intention to give less than a fee simple, the devisee takes nothing less. See, to the same effect, *Hall v. Dickinson*, 1 Grant Cas. 241; S. C., 2 Phila. 123, citing the principal case. The principal case is approved and followed in *Wood v. Hills*, 19 Pa. St. 515; and in *Smith v. Schriver*, 3 Wall. jun. 226.

DEVISE OF REMAINDER OF TESTATOR'S "ESTATE" operates as a devise of the realty: See *Palmer v. Dougherty*, 54 Am. Dec. 636; *Willard's Appeal*, 68 Pa. St. 331, citing the principal case.

COLEMAN v. COLEMAN.

[19 PENNSYLVANIA STATE, 100.]

HILLS CONTAINING IRON ORE WERE HELD IN COMMON by two persons and the minor heirs of another former owner; a right to take ore therefrom for one furnace, existing in another person, his heirs and assigns. These owners were at the same time tenants in common of certain forges and furnaces, to which the ore hills were appurtenant, from which ore was obtained for the manufacture of iron at the forges and furnaces. In 1786 the two owners and the guardians of the minor heirs of the other entered into a written agreement that amicable actions for partition of said furnaces, forges, and ore hills be entered, and appointing certain persons to make the partition. The persons appointed to make partition reported that the agreement could not be carried out without great injustice. Afterwards, in 1787, the same parties entered into another agreement in writing, in which they designated certain persons to make partition of the forges and furnaces, and other real estate held by them in common; but providing that the ore hills "shall remain together and undivided as a tenancy in common," one of the parties to be entitled to three sixth parts thereof, another to one sixth, and the said minors to the remaining two sixth parts thereof; and declaring that neither of the parties, their agents or workmen, should interfere with or interrupt either of the other parties at any mine-hole by them opened and occupied for the purpose of raising iron ore. The entry of amicable actions of partition to carry out the agreement was provided for, and they were entered. The persons appointed made report allotting the furnaces and forges, and reporting that a certain tract of land and said ore hills do still remain undivided, to be held by the parties as tenants in common, according to their respective shares and the covenants and articles of said agreements. The court, in 1787, confirmed this report, and the parties entered on the purparts respectively assigned to them, and they and those claiming under them have since held the same; the right reserved to ore for one furnace being also exercised at the time of the institution of this action. An action of partition to divide the ore hills was brought in 1851, and the court held: 1. That the partition thus made in 1787, by the agreement of the parties in interest, with the sanction of the court having jurisdiction, is binding on the successors in the title, not only because of the judgment of a court in partition under which they claim, but because the covenants in the agreement of 1787 were real and ran with the

land, though the words "heirs and assigns" were not used. 2. That the agreement of 1787, and the judicial proceedings had pursuant to it, constitute an insuperable bar to this action. 3. The keeping of the mine hills in common was the consideration for submitting to the partition of the rest of the estate, and the partition of the mine hills in this action would destroy the foundation on which the former partition rests, and this can not be permitted without a redivision of the whole of the estate. 4. While the laws of Pennsylvania now provide for the partition of any mineral lands held in common, whatever the peculiarities of their structure, neither the letter nor the policy of those laws demands the partition of an estate in circumstances such as attend these hills of ore.

ERROR to the common pleas of Lebanon county. The facts are stated in the opinion.

Reynolds, Weidman, and Meredith, for the plaintiffs in error.

Hughes, Kunkel, and Penrose, for E. B. and C. B. Grubb.

Kline and Morris, for R. Coleman and George D. Coleman.

McCormick and Penrose, for Robeson and Brooke.

By Court, WOODWARD, J. The principal ground of defense against this action of partition is found in the agreement of the thirtieth of August, 1787. It is insisted, on the part of the plaintiffs in error, who were defendants below, that the instrument established a permanent tenancy in common in the ore-banks or mine-hills, and that partition of these can not be had without violating the covenant of the parties, and sacrificing important interests which depend on its maintenance. On the part of the defendants in error, who were plaintiffs below, it is contended that the agreement of 1787 was not intended to establish permanent relations between the parties, and that there is nothing in it to deprive them of the remedies which are incidental to tenancies in common. The construction of that instrument, therefore, is the first thing in this voluminous record to engage our attention. We must first ascertain what the parties meant by their contract, and then we shall be prepared to give it due effect.

The parties to the agreement, or covenant, of the thirtieth of August, 1787, were three—Curtis Grubb, owner of one half of Cornwall furnace and its appurtenances, and one third of Hopewell forges, situated on said estate; Robert Coleman, owner of the Elizabeth furnace estate, and of one sixth of Cornwall, and of one third of Hopewell forges; and the testamentary guardians of Burd Grubb and Henry Bates Grubb, who were owners of one third of Cornwall furnace, and one third of Hopewell forges.

The ore-banks and mine-hills of which partition is sought in this action were part of the Cornwall furnace estate, and before the death of Peter Grubb, the ancestor of Burd and Henry Bates Grubb, he, his brother, Curtis Grubb, and Robert Coleman for Cornwall furnace, Robert Coleman for Elizabeth furnace, and Peter Grubb for Mount Hope furnace, held the said ore-banks and mine-hills, to supply the same respectively with iron ore, as they held the woodland belonging to the said furnaces respectively, for the supply of charcoal for the manufacture of iron; and for the purpose of such supply of iron ore and charcoal, the said ore-banks and mine-hills, and said woodlands, respectively, had been continually held, with and as appurtenances to and parcel of the said furnaces respectively, with the full knowledge and consent of the owners. Two former efforts had been made to part these estates into severalty. One by agreement of the eighth of December, 1785, of the parties then in interest, the other by agreement of the sixth of May, 1786; and in both of these agreements the mine-hills, like the rest of the estate, were to be divided into three equal parts—two equal third parts thereof, considering quantity and quality, to be assigned and allotted to Curtis Grubb and Robert Coleman, according to their several shares, and the other one third equal part thereof to be assigned and allotted to the said Peter Grubb, to be by them held respectively in severalty. This stipulation in these prior agreements is worthy of observation, as manifesting the intention and desire of the parties that the mine-hills should continue to be used and enjoyed as appurtenant to each of the furnaces and forges held in common.

It is apparent that no thought was entertained of separating any one of the establishments from the common fountain of ore which was the element of life and wealth to them all. Partition of the mine-hills was indeed to be had, but it was to be partition into "three equal parts, considering quantity and quality," a result which, had it proved attainable, would have been mutually beneficial, for it would have given to each owner in severalty a competent share of ore for the use of the residue of his estate. But after the fullest investigation by men qualified for the duty, such partition was found impossible; and this discovery led to the agreement of the thirtieth of August, 1787, which is the document now to be construed.

The parties recite that the former agreement can not be carried into execution without the greatest injustice to some of the parties, and that the same had been so represented by the

persons appointed in the said agreement to make partition. "Therefore, in order to remove all difficulties," and assign and allot the premises according to the real interests and convenience of the several parties, this agreement was made, substantially reaffirming that of the sixth of May, 1786, except as to the mine-hills, which, instead of being divided, were to remain "together and undivided, as a tenancy in common," the parties not to interfere with or interrupt each other at any mine-hole by them opened and occupied for the purpose of raising iron ore. Thus we see that the parties made this agreement as the only practicable mode of effecting partition of the whole estate.

It will help us, in construing their covenant, to consider a little in detail some of the "difficulties" which they meant to obviate by this arrangement. They were, first and chiefly, the peculiarities in the formation of these hills. They are described as enveloped in walls of trap-rock, indicating at the surface, by their angles of position, that they came together; but whether they did not expand instead of meet beneath the surface, was uncertain. From these walls irregular sheets or veins of trap-rock were found extending into the iron ore, forming irregular masses of both ore and rock, and in many instances cutting off the ore entirely, so as to render its continuance in a particular direction extremely uncertain. Beside, the ore in the different hills is of different qualities or kinds, and various kinds of ore are found in the same hill, a mixture of which is necessary to make good iron. The ore becomes exhausted at particular places where it is so mingled with sulphur and copper as not to be fit for use.

Such was the structure of these hills; and is it strange that they were regarded as indivisible into "three equal parts, considering quantity and quality"? Geology and mineralogy were unknown as sciences at that day; but even in their present development, they would be incompetent to guide an inquest to such a partition of these shapeless and unstratified masses of rock and ore. This difficulty, then, was inherent in the subject-matter, and however it might be dealt with now, was regarded as insuperable in 1787. Unless violence be done to the intention of the parties, their agreement must be so construed as to remove this difficulty. That is, the physical peculiarities of these hills must not be permitted to prevent partition of the rest of the estate, and when the rest of the estate shall be divided, each part must have participation in the varied treasures of the hills. The state of the law of partition in

Pennsylvania constituted another of the "difficulties" of the parties. At common law, there was no writ of partition between tenants in common. It was given by the statute of 31 Henry VIII., which was extended to Pennsylvania. In 1772 an act of assembly empowered the courts of this state to issue writs of partition, and this was all the legislation in force here at the time this agreement was made. By an act of 1799, and various subsequent acts of assembly, the powers of the courts are enlarged, and proceedings in partition fully regulated; and if, upon inquisition, the estate be found incapable of division without prejudice to or spoiling the whole, it is appraised and valued; if divided at all, the parts are appraised, tenants in common are called in to elect to take or refuse at the appraised value, unequal parts are equalized by owelty, and if all the tenants in common refuse to take, the estate is sold and the price divided. Under these acts of assembly, partition or a sale could now be compelled of an estate situated as this was in 1787; but at that time there was no provision in force for valuation, election, owelty, or sale. The parties contracted with a view to the law as it then stood. We had no court of chancery to administer the statute of Henry VIII., and the statute provided only for equal partition among tenants in common, as estates of coparceners were divisible at common law. Such a division the parties believed to be impossible, and they accordingly undertook to do that for themselves which the law was incapable of doing for them. Had the law authorized a valuation of parts, and enabled the court to order a sale, they would not, peradventure, have come into the agreement to divide part of their estate and hold the rest in common, for some might have preferred a sale. 3. Another difficulty sought to be avoided arose out of the reservation of an incorporeal hereditament in the deed of the ninth of May, 1786, Peter Grubb and wife to Robert Coleman, for an undivided sixth of Cornwall furnace, and an undivided third of Hopewell forges and appurtenances. This reservation was in these words: "Saving and excepting unto the said Peter Grubb, jun., his heirs and assigns forever, the right, liberty, and privilege, at all times thereafter, of entering upon the premises, and of digging, raising, and hauling away a sufficient quantity of iron ore for the supply of any one furnace, at the election of Peter Grubb, jun., his heirs and assigns, at all times thereafter." This was a right reserved of entering upon nine thousand six hundred and sixty-nine acres of land, and taking ore for the supply of any one furnace. What

would have become of this easement on partition among the tenants in common of the estate out of which it was reserved? Would Peter Grubb have been limited to the one sixth part that might have been set out in severalty to his grantee, Robert Coleman? This would have shorn the incorporeal hereditament of five sixths of its value, without the consent of the owner of it. Would Peter Grubb have been permitted to enter and take ore from any part of the premises, as before partition? This would have worked a prejudice and surcharge to the other tenants, for, unquestionably, the grant to Coleman, and the reservation to Peter Grubb, constituted but one "stock," as in *Lord Mountjoy's Case*; and together they might not take more than one sixth: See that case in 1 Thomas' Co. Lit. 536. Had the parties contemplated a sale of the estate, or the taking of it by one tenant in common at a valuation, this easement would have followed the estate, like an incumbrance; but they had no thought of separating any one of themselves from the mine-hills, by sale or valuation. They looked only to a partition of those hills among themselves, in equal parts, "considering quantity and quality," and in the way of such a measure stood this easement, as a formidable difficulty.

Such were the "difficulties" which the parties, on a full investigation, saw in the way of such partition as was contemplated in the agreements of 1785 and 1786. They made the agreement of 1787 to avoid these difficulties. And as the difficulties all pertained to the mine-hills, they agreed to divide the rest of the estate, and not to divide these, "provided always, and it is hereby agreed, that the ore-banks belonging to Cornwall furnace, shall remain together and undivided as a tenancy in common; the said Curtis Grubb, being entitled to three sixth parts, the said Robert Coleman being entitled to one sixth part thereof, and the said minor children being entitled to the remaining two sixth parts thereof; and that for this purpose, an accurate survey shall be made of the said ore-banks and hills, if not already done, and it is hereby declared to be the true intent and meaning hereof, that neither of the said parties, their agents or workmen, shall interfere with or interrupt either of the other parties at the mine-hole by them opened and occupied for the purpose of raising iron ore." Such were their words.

I do not purpose to follow counsel in a critical analysis of the words "remain together, undivided," in the above proviso, for it is a canon of interpretation that too much regard be not had to the native and proper definition, signification, and accept-

ance of words and sentences to pervert the simple intentions of the parties. The lawyer who forms his opinion on the mere words, without the context, goes only skin-deep into the argument: Shep. Touch. 87.

We have seen what the difficulties in the way of parting this estate into severalty were, and that they were inherent and enduring. So long as the ore should last, the estate would be incapable of equal partition; and yet so long as these furnaces and forges should continue to manufacture iron, that ore would be wanted. They used words to obviate the difficulty. The remedy was commensurate with the evil. Experience had proved it possible for these tenants in common to supply the wants of their respective establishments by occupying each his mine-hole, and the fullest investigation had demonstrated that this was the nearest to a partition in severalty to which these hills could be brought, without "the greatest injustice to some of the parties." Just in that condition, therefore, shall the mine-hills be left; "remain" is the word. How long? it is asked. I answer, As long as the "difficulties" remain. As long as the ore endures and continues to be wrought in these furnaces and forges. "Remain together, undivided," not for a day, or month, or year, so that at any of these intervals either party should be at liberty to sue out partition, and bring on the difficulties again; but these words meant that partition should not be sought whilst the difficulties, the convenience, and the interests of the parties as iron-masters continued as they were. We see in these words, when taken in connection with the history of the case, a clear intention to exempt the mine-hills from partition, and continue the participation of the parties in the manner experience had suggested and established. If the ore should fail (a contingency which at that day may have been deemed probable), or the manufacture of iron on the estate should cease, the agreement would have accomplished its mission, and the hills might then be parted. But until the happening of one or the other of these events, they were to remain appurtenant to the rest of the estate as before. The stipulation about the Bingham tract is an example of a more temporary, as that about the water right is a more permanent, arrangement than this concerning the mine-hills. The Bingham tract was to remain undivided "for the present," indicating a right to partition at any convenient time future. The water right was to remain to Curtis Grubb and Robert Coleman, their heirs and assigns forever. This was assignment to them of the water right in fee. But the mine-hills should

remain undivided, not only for the present, but whilst existing circumstances continued; and yet not necessarily forever, for these circumstances might cease to exist.

That this is the true construction of the agreement may be very clearly inferred from the conduct of the parties and those claiming under them.

For more than sixty years they have used the mine-hills as appurtenant to their respective properties. They have invested large sums of money in purchases and improvements made on the faith of the relation established by this agreement. Their expensive and valuable furnaces and forges—valuable, because of their connection with this fountain of supply—will, if severed now, be left on their hands only to decay; and embarrassment and ruin will befall the productive industry in which they are engaged. Did they stake these important interests on the relations of a day? Did they understand that the connection of some of these establishments with the mine-hills was to cease whenever the caprice or the interests of any co-tenant should dictate a demand for partition?

The construction of all contracts, whether sealed or simple, should be reasonable, and as near the minds and apparent intents of the parties as possible. Words are primarily the proper signs of their ideas, but when the meaning of their words is disputed, what higher evidence of their intention can we obtain than their acts and conduct? These are a practical interpretation of their agreement, and we should do violence, both to their intention and their interests, if we failed to adopt that construction to which not only their words but their acts so unequivocally point.

The interpretation of the writing being such as we have expressed, it is next to be observed that the parties made it part of a judgment in partition.

By the agreement of the sixth of May, 1786, amicable actions of partition were to be entered in Lancaster and Dauphin counties, and partition was to be decreed agreeably to the report of the persons appointed to make partition, and that report was to be binding and conclusive on all parties to the agreement, and no "obstructions either in court or elsewhere were to be made by any of the said parties to the carrying of said report into full and complete effect, and making the said partition perfect and conformable thereto." These provisions were carried into the agreement of the thirtieth of August, 1787, by the words: "And it is further agreed that the article in the former agree-

ment respecting the entry of amicable action in case and partition, and the report of the persons before appointed, and process and proceedings therein, shall be fully adopted according to the true intent and meaning of this agreement."

The persons named in these two agreements proceeded to make partition by assigning Cornwall furnace and certain designated tracts of land to Curtis Grubb and Robert Coleman, three undivided fourths to the former, and one to the latter; Union forge, situate on Swatara creek, with a contiguous tract of land, to Curtis Grubb; two certain houses and lots of land in the town of Lebanon to Robert Coleman; Hopewell forges, with certain designated tracts of land, to Burd Grubb and Henry Bates Grubb; and for equality of partition they awarded certain sums of money to be paid among the parties, and then added the following: "And we do further report, that the tract of land called Bingham's place, at Conewaga, together with a small tract of fifty acres of land adjoining thereto, and also the ore-banks and mine-hills of Cornwall furnace, do still remain undivided, to be held by the said Curtis Grubb, Robert Coleman, Burd Grubb, and Henry Bates Grubb, as tenants in common according to their respective shares, and to the covenants and articles in the said agreement hereinafter recited contained." This report so made was confirmed in the courts of common pleas of Lancaster and Dauphin counties (then including Lebanon), on the day of November, 1787, and partition in said actions was fully executed, and the parties entered upon the purparts respectively assigned to them, which they and those claiming under them have continued to hold ever since.

Thus the agreement of 1787 became the judgment of a court of record. These titles afterward, by sundry conveyances, united in Robert Coleman and Henry B. Grubb, who, on the thirtieth of November, 1802, entered into an agreement for the amicable partition of Mount Hope furnace and Hopewell Forges; but "the ore-banks," said the agreement, "shall be excluded from said partition, and shall not be taken into consideration by said inquest." By this partition, Hopewell forges and two thousand three hundred and eleven and one half acres of land were allotted to Henry Bates Grubb. The ore-banks and mine-hills continued to be used as appurtenant to these properties.

Robert Coleman made his will on the third of March, 1822, and died on the third of September, 1825. He devised Corn-

wall furnace, Elizabeth furnace, and Hopewell forge, and all his right, title, and interest in the ore-banks and mine-hills, to his three sons, William, James, and Edward.

By virtue of conveyances, descents cast, and actions of partition, Elizabeth furnace with its appurtenances became vested in the plaintiffs below, defendants in error Robert Coleman and George Dawson Coleman; Cornwall furnace with its appurtenances in Robert W. Coleman; Colebrook furnace with its appurtenances in William Coleman; and Mount Hope furnace with its appurtenances in Edward B. and Clement B. Grubb, defendants below and plaintiffs in error. All these establishments continue to be used for the manufacture of iron.

The incorporeal hereditament reserved in the deed of the ninth of May, 1786, from Peter Grubb to Robert Coleman, became vested in Henry P. Robeson and Clement Brooke, and they use it to supply Reading furnace with ore.

The parties before us, it is thus seen, derive their titles through that judgment in partition in 1787, which was "according to the covenants and agreements" of the thirtieth of August, 1787. The covenant of 1787 was inwrought into the titles of the parties by the judgment of the law, whose decree was, that the partition thus made should remain firm and stable forever. That decree is conclusive until reversed or set aside. If mistake or fraud be committed in making up a record, it can neither be averred nor proved in a collateral proceeding, nor in an action founded on it. The record must be received as absolute verity, and speak for itself. If wrong, the only mode of having it corrected or set right is by an application to the court where the judgment was had, of which the record is a memorial. In no other manner can a party or a privy to the judgment be relieved, as I apprehend, in any case: *Morris v. Galbraith*, 8 Watts, 168; *Hoffman v. Coster*, 2 Whart. 474.

A covenant founded in sound reason and experienced necessities bound the parties to hold the mine-hills together for the use of the whole estate. A decree of a court of justice in partition recognized and incorporated that covenant. As between the parties, the continuance of the mine-hills in common became a consideration for submitting to the partition of the rest of the estate. The implied warranty which attends partition, attached here, and if now all that was done is to be overthrown as to the mine-hills, it must necessarily destroy the whole of that partition: *Feather v. Strohoecker*, 3 Pen. & W. 506 [24 Am. Dec. 342].

If these parties are not to hold the mine-hills as tenants in common, then they no longer hold their respective parts of the rest of the estate as tenants in severalty. But if they hold these parts in severalty by virtue of a record unimpeachable collaterally, then by the same record they are to hold the mine-hills in common. That record is as sure for the one purpose as the other. And the decree fixed the mode of enjoyment as well as the tenancy in common. Each party was to occupy his appropriate mine-hole. Insurmountable difficulties being found in the way of dividing this part of your estate, we obviate them by decreeing that you hold it in common, as appurtenant to each of your estates in severalty, and that you use each his proper mine-hole. The ore taken by each can then be estimated, and equity will compel an account among you for the adjustment of balances. Such, in effect, was the language which the decree of the court addressed to the tenants in 1787, and has ever since sounded in the ears of their successors. That voice is as potential now as it was then, and these parties are as much bound to heed it as their ancestors were, for it is the voice of the law, echoing only the terms of the covenant under which they hold their estates.

This was in effect partition of the profits of the mine-hills. The soil was valueless. The ore was the object to be secured, and this was indivisible into equal parts. The law did not enable one tenant to compel a sale, and there was the outstanding easement which was not subject to partition. What could be done in such circumstances, except that which was done—make the hills an appurtenant of each several property, and secure to each tenant participation in the products, in the manner their convenience and experience had suggested.

Partition thus made of the usufruct is not without analogies and direct authority in law. We have said that partition at common law was confined to coparceners, but inasmuch as the statute of 31 Henry VIII. gave partition to tenants in common in "like manner and form as coparceners by the common law of this realm have been and are compelled to do," principles drawn from the law of partition among parceners are applicable to partition among tenants in common. Especially is this the case in Pennsylvania, where our statutes of inheritance and distribution have substituted tenancy in common for the English coparcenary. What, then, was the "manner and form" in which parceners had partition of the profits of impartible estates?

In speaking of indivisible inheritances, Lord Coke asks, What

shall become of them? He first answers that the eldest shall have them, and others shall have an allowance in value in some other of the inheritance.

But what if the common ancestor left no other inheritance to give anything in allowance? It is answered that one coparcener shall have the inheritance for a time, and the other for a like time. Or in case of a piscary, one may have one fish and the other the second one; or the one may have the first draught and the second the second draught. If it be a park, one may have the first beast, and the second the second. If a mill, one to have it for a time, and the other for a like time; or the one one toll dish, and the other the second. And this, he adds, appears to be the ancient law: 1 Thomas' Co. Lit. 537. And says Littleton: "It is to be understood that partition may be made in divers manners. *Modus et conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur.*"

In Allnath on Partition, 3-5 L. L., it is laid down, that there may be partition in effect, and so as to give to each parcener a species of enjoyment in severalty, without any division of the land.

In *Salisbury v. Phillips*, 1 Salk. 43, Lord Holt said: "When the thing and its profits are the same, partition of the profits is partition of the thing." See also *Warner v. Baynes*, 2 Amb. 589; *Baker v. Talbott*, 6 T. B. Mon. 179.

In the case of *Conant v. Smith*, 1 Aik. 67 [15 Am. Dec. 669], in which an ore-bed similar to this was attempted to be brought into partition, the supreme court of Vermont denied both partition and a sale, on the ground that neither could be had without injustice to the parties, and suggested that a court of equity had the power to regulate the enjoyment of the property between the owners by restricting them to the proportion of their respective interests, by compelling accounts between them, and by appointing a common receiver for all parties.

That our courts possess the equity powers here referred to can not be doubted, since the act of assembly of the twenty-fifth of April, 1850, Purdon, the twenty-fourth and twenty-fifth sections of which confer upon the courts of common pleas equity jurisdiction to compel accounts between tenants in common of "coal or iron-ore mines or minerals."

The partition thus made in 1787, by the agreement of the parties in interest, with the sanction of the court having jurisdiction, and in accordance with law, is binding on the successors in the title, not only because of the judgment of a court in

partition, under which they claim, but because the covenants of 1787 were real, and ran with the land, though the words "heirs and assigns" were not used. See *Packenham's Case*, cited in *Spencer's Case*, 5 Co. 16, and Mr. Hare's note in 1 Smith's Lead. Cas. 108; 2 Thomas' Co. Lit. 247-249. Even if the covenant did not so run with the land as to give a right of action to an heir or alienee, it would serve to rebut this action, for the law is, in regard to the implied warranty which annexes itself to exchange and partition, that though it does not extend to assignees, yet the assignee shall rebut. See note to Co. Lit. 249. Much more may an express covenant be set up by a privy in estate against the very action which it was the object of the covenant to exclude, though no words of perpetuity were used.

We have thus demonstrated, satisfactorily at least to our own minds, that the agreement of the thirtieth of August, 1787, and the judicial proceedings had pursuant to it, constitute an insuperable bar to this action. It follows that the court below were in error in rendering judgment for the plaintiffs.

Against these conclusions it is urged that the partition of 1787 left the mine-hills a tenancy in common, and that partition is an inseparable incident of the estate of tenants in common, and therefore these plaintiffs should not be estopped.

But it must be apparent that this action is nothing more than an attempt to have a second partition of that which has already been the subject of partition.

A large estate held in common, and involving various and complicated interests, was brought into severalty by reason of the exemption of the hills from the ordinary course of partition. Partition in deed was virtually made of them, and yet the plaintiffs, not proposing to redivide the whole estate, would destroy the foundation on which the former partition rests, by subjecting the mine-hills to an actual division or sale. This can not be permitted. Estates in common are undoubtedly meliorated by partition into severalty, and the interests of society require the statutes of partition to be liberally construed.

We have no doubt that any mineral lands held in common, whatever the peculiarities of their structure, are subject to partition under our acts of assembly, for if upon inquest it is found they can not be divided without prejudice to or spoiling the whole, they may be ordered to one or more of the tenants at a valuation, or be sold and the price divided. But neither the letter nor the policy of our statutes demands partition of an estate in circumstances such as attend these hills of ore. The

incidental right which the plaintiffs claim is gone, was surrendered by those under whom they claim, and they are enjoying, in the severalty of their estates, the consideration of that surrender.

There are many other matters suggested in the able and elaborate argument of this cause which we do not take space to discuss. Nor do we notice in detail the errors assigned to the opinion of the court below, because the capital error into which the court fell was in sustaining the plaintiffs' action.

We put our judgment on the covenant of the persons under whom the parties litigant hold, and the judicial proceedings had thereon, and we refuse any further partition of these mine-hills, because as yet that covenant is operative, and the hills must "remain together and undivided, as a tenancy in common."

Judgment reversed.

THE PRINCIPAL CASE WAS CITED in *Coleman v. Grubb*, 23 Pa. St. 407, as having fully discussed the difficulties in the way of making an equal partition of the mine-hills, and the motives and reasons of the parties for agreeing to hold them undivided. In *Brown v. Lutheran Church*, Id. 500, it was referred to as a striking instance of a case in which a court will deny the right to a partition. In *Blewett v. Coleman*, 40 Id. 50, it was referred to as having fully discussed the title to the mine-hills and the peculiarities of their geological construction. In *Coleman v. Blewett*, 43 Id. 178, it was referred to as a case in which the court had given effect to the title papers according to their terms, and forbade the partition. And in *Funk v. Haldeman*, 53 Id. 246, it was referred to as an instance of an imponible estate.

RAILROAD COMPANY v. SKINNER.

[19 PENNSYLVANIA STATE, 298.]

RAILROAD COMPANY IS NOT LIABLE TO OWNER OF CATTLE who suffers them to go upon the track where they are killed, unless the damage done is gratuitous.

RAILROAD COMPANY IS PURCHASER, IN CONSIDERATION OF PUBLIC ACCOMMODATION and convenience, of the exclusive possession of the ground paid for by it, and of a license to use the greatest attainable rate of speed, with which neither the person nor the property of another may interfere.

RAILROAD COMPANY IS NOT BOUND TO FENCE ITS ROAD, in Pennsylvania. WHERE THERE IS NO EVIDENCE OF NEGLIGENCE ON PART OF DEFENDANT, it is error to submit the question of negligence to the jury as a debatable matter.

WHETHER OWNER OF ANIMAL KILLED ON RAILROAD KNEW OF ITS DANGER or not, is not a material inquiry in an action against the company for its loss.

ERROR to the common pleas of Susquehanna county. Trespass on the case, brought by Josiah Skinner against the New York and Erie Railroad Company for killing a cow of the plaintiff while upon the company's track. The declaration alleged that the occurrence happened through the negligence of the engineer. The other facts are stated in the opinion.

Richards, for the plaintiffs in error.

H. Wright and Bentley, for the defendant in error.

By Court, Gibson, J. An action for such an injury as is laid in this declaration is founded in negligence, of which there was not a particle of proof at the trial. The company was using its chartered privilege in the usual way, and its act was lawful. Doubtless case may be maintained for negligence in conducting a railway train as well as in conducting any other vehicle, as was ruled in *Bridge v. The Great Junction Railway*, 3 Mee. & W. 244; but what is such negligence has not been entirely determined. In *Aldridge v. The Grand Western Railway*, 4 Scott N. R. 156; S. C., 1 Dowl. N. S. 247, an action was maintained for suffering sparks to fly from the engine to a bean-stack; and this is all we have for it in the shape of decision. No doubt a company is answerable for gratuitous damage; but what evidence was there of such damage in this case? Absolutely none. The testimony is consistent, and it shows that the train was going at the usual speed; that it was within three hundred feet of the spot when the cow jumped suddenly from the ditch to the track; that the engine was instantly reversed and the signal given to brake; and that alacrity could do no more. The retropulsive power at the disposal of the engineer was applied in vain. Had he been able to stop the train in time to save the cow, he could not have done it without periling the passengers. Granting, what one of the witnesses testified, that the cow might have been seen at the distance of fifty rods by the wayside, and granting that the train might have been stopped within it, yet the engineer was not bound to stop it. He had no reason to apprehend that she would leap into the jaws of death, or that it was necessary to anticipate her.

But high above this stands the impregnable position that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the greatest attainable rate of speed, with which neither the person nor property of another may interfere. The company on

the one hand, and the people of the vicinage on the other, attend respectively to their particular concerns, with this restriction of their acts, that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of every assemblage of those loitering or roving cattle by which our railways are infested. Any other rule would put a stop to the advantages of railway traveling altogether. And for what deprive the country of one of the best improvements of this most wonderful age? For no more than to enable a few unpastured cows to pick up a scanty subsistence in waste fields and lanes. If the bullocks, cows, horses, sheep, or swine of the neighborhood were allowed to block the way, the prohibition of intrusion by drovers or travelers using their own means of conveyance would be of little use. For the sake of the company and the passengers, the conductor and his subordinates will be vigilant to remove obstructions; but the protection of the property is merely incidental. If the owner of it do not attend to it, the company's servants, having their own business to mind, are not bound to do so; and he who trusts his property to the chances of accident is bound to stand the hazard of the die. *Knight v. Aberi*, 6 Pa. St. 472 [47 Am. Dec. 478], is to the point. In that case the intrusion was on woodland; in this it was on the exclusive possession of ground paid for as an incorporeal hereditament.

So far we have treated the case as if the plaintiff's skirts were clear, but they are not. By the common law of England, an owner of cattle is bound to keep them in an inclosure or in custody, at his peril, for every entry by them on another's possession is a trespass: by the common law of Pennsylvania, he may let them go at large without incurring liability for an entry by them on woodland or a waste field. To entertain an action for an inappreciable injury would encourage vexatious and unprofitable litigation, and be contrary to the maxim *de minimis*, which is peculiarly appropriate to the circumstances of the people here. But if such an intrusion would occasion substantial damage, the English rule would be applicable to it, on the principle that the owner of a bull which has gored another's ox must pay for it. Is not the intrusion of an animal on a railway, which has a direct tendency to throw a train off the track and endanger life and member, an injury to the persons involved in the risk? It is conceded that an American company is not bound to fence its railway as an American farmer is bound to fence his fields; and this shows that persons who suffer their cattle to go upon it

do so on their own responsibility. Every English railway is fenced—not to protect it from cattle, for none are at large—but to prevent detriment or detention from other causes. In a country so new and so sparse as ours, of which the trunks of the principal railways are more extensive than the island of Great Britain, the cost of fencing them would be greater than could be borne. The rights and responsibilities of a people are shaped by the circumstances of their condition. If they will have railways, they must be content to have them in the only way they are practicable; and the English rule must be applicable to them. If an owner suffer his cattle to be at large, it must be at the risk of losing them or paying for their transgressions. The very act of turning them loose is negligence, as regards any one but an owner of a forest or a waste field; and the owner of them is consequently responsible to every one else. That he is not answerable for them to a railway company criminally, like a caitiff who has laid a log or a bar across the track, is because mischief was not intended by him. But no prudent man in his predicament would be the first to make a stir about it.

The charge was accurate in its outline, but not in its details. As has already been said, there was no evidence of negligence on the part of the defendant; yet the existence of it was left to the jury as a debatable matter. In another part, he even took the fact for granted. "The simple fact," he said, "of permitting, for a limited time, the cow to wander on the railroad would not of itself be such negligence as to excuse all negligence on the part of the defendant." Had there been evidence to raise the point, the direction might have been well enough; but the application of the principle in the particular instance was wrong. In *Sills v. Brown*, 9 Car. & P. 605, it was ruled that in cases of accident with carriages or ships, mutual negligence, if contributive to the injury, bars an action for it—a principle enforced by this court in *Simpson v. Hand*, 6 Whart. 311 [36 Am. Dec. 231]. But it was erroneous to predicate it of a case in which the negligence was all on the side of the plaintiff. He further charged, that "if the plaintiff knew his cow was wandering on the railroad, it was his duty to drive her therefrom. He had no right to suffer her to be there; and if he suffered it, knowing her to be there, he was guilty of such negligence as would prevent his recovery. But if his cow casually wanders away, ordinary care being used to restrain her, the simple fact of her being on the track would not excuse the defendant's negligence." Now the

making of this gratuitous imputation of negligence and ignorance of the cow's whereabouts turning points of the cause is the root of the error. As loss of the property is not a penalty for the owner's supineness in the care of it, of what account is his ignorance of its jeopardy? The irresponsibility of a railway company for all but negligence or wanton injury is a necessity of its creation. A train must make the time necessary to fulfill its engagements with the post-office and the passengers; and it must be allowed to fulfill them at the sacrifice of secondary interests put in its way; else it could not fulfill them at all. The maxim of *salus populi* would be inverted; and the paramount affairs of the public would be postponed to the petty concerns of individuals. Every obstruction of a railway is unlawful, mischievous, and abatable at the cost of the author or owner of it, without regard to his ignorance or intention. It may seem cruel to make a dumb brute suffer for the fault of its owner; but it must be remembered that the lives of human beings are not to be weighed in the same scales with the lives of a farmer's or a grazier's stock; and that their preservation is not to be left to the care which a man takes of his uncared-for cattle. Allowing them to prowl for their food, he may not wash his hands of the consequences of it. In a country so obnoxious to the charge of indifference to human safety, it is a high and holy charge of the courts to hold to their duty, not only those to whom it is immediately committed, but also those by whose defaults it may be remotely endangered; and to hold them hard. We are of opinion that an owner of cattle killed or injured on a railway has no recourse to the company or its servants; and that he is liable for damage done by them to the company or the passengers.

Judgment reversed.

CONTRIBUTORY NEGLIGENCE OF PLAINTIFF, EFFECT OF: See *Robinson v. Cone*, 54 Am. Dec. 67, note 74, where other cases are collected; *Munger v. Tonawanda R. R. Co.*, 53 Id. 384, note 387.

LAW IMPUTES NEGLIGENCE TO OWNER OF CATTLE that escape from inclosure and go upon railroad track, where they are run over: *Munger v. Tonawanda R. R. Co.*, 53 Am. Dec. 384, note 387, where numerous cases are collected. If cattle are suffered to run at large, and are injured or killed on the track of a railroad company, without wantonness or gross negligence, the owner has no recourse against the company or its servants: *North Pa. R. R. Co. v. Rehman*, 49 Pa. St. 105; *Maynard v. Boston & Me. R. R.*, 115 Mass. 460, both citing the principal case.

To SUSTAIN ACTION AGAINST RAILROAD COMPANY FOR KILLING CATTLE, the plaintiff must prove negligence on the part of the company, and the absence

of contributory negligence on his part: *Perkins v. Eastern R. R. Co. and Boston & Me. R. R. Co.*, 50 Am. Dec. 589, note 591; *Tonawanda R. R. Co. v. Munger*, 49 Id. 239, note 261, where the subject is fully discussed.

THE PRINCIPAL CASE IS CITED in the following cases in support of these propositions: In *Powell v. Pennsylvania R. R. Co.*, 32 Pa. St. 416, the courts accept no excuse from the party who obstructs the track or interferes with the transportation of the company; in *Philadelphia & R. R. R. Co. v. Hammell*, 44 Id. 378, the conductor of a train is not bound to attend to the uncertain movements of cattle on the railroad track; in *Philadelphia & R. R. R. Co. v. Spearen*, 47 Id. 403, railroad companies have a right to the lawful use of their roads without let or hinderance of those who have no right to interrupt or molest their enjoyment; in *Drake v. Philadelphia & E. R. R. Co.*, 51 Id. 241; and in *Pennsylvania R. R. Co. v. Ribley*, 68 Id. 166, a railroad company is not, unless required by its charter, compelled to fence its track.

THE PRINCIPAL CASE IS DISTINGUISHED in *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 240.

CARSON & MCKNIGHT v. BAILLIE.

[19 PENNSYLVANIA STATE, 375.]

WHERE GOODS ARE SOLD ON INSPECTION, THERE IS NO STANDARD BUT IDENTITY, and no warranty implied other than that the identical goods sold, and no others, shall be delivered. The name given to them in the bill of parcels is then immaterial, for faith was placed, not in the name, but in the quality and kind discovered on the inspection; but if there be fraudulent concealment or misrepresentation, the case is different.

ERROR to the district court of Allegheny county. Action on the case for alleged deceit or breach of warranty in the sale of forty-six barrels of lard grease. The facts are stated in the opinion.

Shinn, for the plaintiffs in error.

Jones and McCandless, for the defendant in error.

By Court, LOWRIE, J. It is not easy to describe this case in a few words, because of some uncommon features which it presents. We have an idea of its character when we learn that Baillie bought of Carson & McKnight forty-six barrels of lard grease, and being disappointed in his expectations as to its quality, he sued Carson & McKnight for damages, for the deceit practiced on him, and for not delivering the article bargained for.

We are not called upon to criticise the very peculiar and anomalous declaration filed in the cause, as it will not require much attention to the rules of pleading to cure its imperfections before another trial. Certainly the principal declaration claims

ex delicto, and the count added on the trial *ex contractu*, and this misjoinder would have been a sufficient cause of reversal if the attention of the court below had been properly called to it by a specific objection or by a demurrer.

The principal question is on the merits of the cause. There was evidence that the buyer examined the article called lard grease before he bought it; that an inspection of the whole lot was offered to him, and that after examining four or five barrels in the usual way, he declared himself satisfied, and received a bill of sale in which the article was called lard grease. On the other hand, there was evidence that a large part of the article delivered was of a very inferior quality; some of it not being lard grease, but a mixture of grease and potash.

On such evidence, the learned judge charged the jury that their proper inquiry was, whether or not the article delivered was lard grease; and if not, then it did not correspond in specie with the article described in the bill of sale, and the plaintiff was entitled to recover. It will be observed that this instruction excludes all question of fraud, sets aside the evidence that the bargain was made on a view of the article, assumes that the bill of sale is the only evidence of the contract, and that the name lard grease given therein amounts to a warranty of the character of the article. Our decisions, *Borrekins v. Bevan*, 3 Rawle, 28 [23 Am. Dec. 85]; *Jennings v. Gratz*, Id. 168 [23 Am. Dec. 111]; *Fraley v. Bispham*, 10 Pa. St. 320 [51 Am. Dec. 486], declare that on a sale of goods by sample, or by a description in a bill of parcels, there is an implied warranty that the article corresponds in kind with the sample in the one case, and with the bill of parcels in the other. But notwithstanding some unguarded observations to be found in the books, it certainly was never intended to be decided that in case of sale by sample, or on an inspection of the article itself, a warranty may be implied from the bill of parcels. This would be equivalent to declaring the bill to be the only evidence of the contract, a proposition that was never thought of; and all the cases on implied warranty show that no such decision was ever intended.

When a sale is by sample, then the sample, and not the name given in the bill of sale, is the standard by which the article is to be tested, because the purchase is made on the faith of the correspondence between the sample and the goods sold. Where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered.

The name given to them in the bill is then immaterial, because faith was placed, not in the name, but in the quality and kind discovered on inspection. If there be fraudulent concealment or misrepresentation, the case is altered, and for this the party has his remedy on other principles.

In this case there was no pretense of a sale by sample, and there was no evidence tending to show a want of correspondence between a sample and the goods delivered. We do not see how it was possible for the plaintiff to recover on the ground that he did not get the very article that he bought, for there was no evidence to sustain such a position. We do not see how he could recover on the ground of deceit, for we discover no evidence of fraudulent concealment or misrepresentation. And he can not recover on the footing of the name given in the bill of sale, while it appears evident that he bought on the faith of his own inspection, and not on faith in the name by which the article was called. It would be rather a bold presumption to suppose that a lard-oil manufacturer would not know the article of lard grease on inspection better than a grocer or commission merchant, or that an article so various in its quality should be purchased by its name, when an inspection was had or might have been.

Judgment reversed, and *venire de novo* awarded.

WARRANTY IN SALE OF GOODS: See *Gelly v. Rountree*, 54 Am. Dec. 138, note 145, where other cases are collected. There is no implied warranty of quality in the ordinary case of a sale on inspection: *Lord v. Grow*, 39 Pa. St. 91, citing the principal case. To avoid a sale, there must have been artifice intended and fitted to deceive: *Smith v. Smith*, 21 Id. 372, citing the principal case. To avoid a sale on the ground of the quality being bad, a warranty must be shown: *Heilbrunner v. Wayte*, 51 Id. 281, citing the principal case.

BARCLAY v. WEAVER.

[19 PENNSYLVANIA STATE, 396.]

HOLDER OF NEGOTIABLE NOTE MAY PROVE BY ORAL TESTIMONY that at the time of the indorsement thereof it was agreed by the maker, indorser, and holder that the indorser should be absolutely bound for the payment of it, without the usual demand and notice.

INDORSEMENT OF NEGOTIABLE PAPER IS NOT REGARDED AS WRITTEN CONTRACT to pay on condition that the usual demand be made and notice given. The most that can be said is, that from it there is implied a contract to pay on condition of the usual demand and notice; but this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally or in

writing. The duty of demand and notice, in order to hold an indorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time by the indorser.

PROVISIONS OF ACT OF APRIL 5, 1849, IN REFERENCE TO NOTICE to parties to promissory notes, do not apply to notes due before the passage of the act.

ERROR to the district court of Allegheny county. Action on the case brought by Elizabeth Barclay against Jacob Weaver, jun., as the indorser of a promissory note, as follows:

"\$1,000.

PITTSBURGH, January 21, 1848.

"Six months after date, I promise to pay to the order of Jacob Weaver one thousand dollars, with interest from date, without defalcation, value received.

B. WEAVER.

"Indorsed: JACOB WEAVER, jun.

"H. A. WEAVER."

Testimony on the part of the plaintiff showed that the money loaned was applied to relieve Jacob Weaver of that amount of liabilities as indorser on other notes of B. Weaver. Jacob Weaver wished the note to be drawn for twelve months, inasmuch as he would have to pay it, and he would incur no liabilities that would fall due within that time. He agreed to indorse provided the money should not be called in at the expiration of the six months. In accordance with this agreement, the payment of the note was not required. When he was called on to renew the obligation as indorser, in May, 1848, he said that he would have to pay it, and that if the money were not called in when it became due, he would again indorse. This proposition was acceded to, and he again became indorser. When called on in August, he refused to renew the obligation. No proof was made of presentation, demand, and notice, when the note fell due. The seventh and eighth sections of the act of April 5, 1849, which the court below decided not to be applicable to notes due before the passage of the act, and which decision is held by the supreme court to be correct, is in these words: "Sec. 7. From and after the passage of this act, in all cases where suit is brought in any of the courts of this commonwealth, upon or for the recovery of the amount due on any promissory note, post-note, note of hand, due-bill, bill of exchange, draft, order, check, or other instrument of writing in the nature thereof, no plea shall be available, and no defense shall be made or taken by the defendant for want of proper and timely demand of payment and acceptance, or proper and timely protest and notice of non-acceptance or non-payment of the same,

unless the respective places where such demand is to be made, and where such notice is to be served and given, or the names and residences or places of business of the respective parties thereto, shall be legibly and distinctly set forth thereon. Sec. 8. When such places of demand and notice, or such names, residences, or places of business, are omitted to be set forth, demand of acceptance, as well as protest for and notice of non-acceptance, may be made or given at any time before the maturity of such instruments as require acceptance and demand of payment as well as protest for and notice of non-payment of the same, at any time after the maturity thereof, and before suit is brought thereon."

Shaler and Stanton, for the plaintiff in error.

By Court, LOWRIE, J. I decided this cause while I was judge of the court below, and I am now instructed to say that my decision on the second point was right, and for sufficient reasons. But on the first point I am convicted and convinced of error.

That point presents the question, May a party prove, by oral testimony, that, at the time of the indorsement of a promissory note, it was agreed that the indorser should be absolutely bound for the payment of it, without the usual demand and notice? This was answered in the negative in the court below, on the principle that oral testimony can not be heard to vary the terms of a written contract.

The error consists in the assumption that the law regards an indorsement as a written contract to pay on condition that the usual demand be made and notice given.

It is not so. For where the indorser is himself the real debtor, as in the case of accommodation notes and bills; or has taken an assignment of all the property of the maker as security for his indorsement; or where he can have no remedy against the makers; or in the case of the drawer of a bill of exchange, where the drawee is, and during the currency of the bill continues to be, without funds of the drawer; and in many other such cases, demand and notice are not necessary; and these circumstances may be proved by parol testimony. The reason is, that in such cases demand and notice can be of no use, and therefore the law does not require them.

The most, therefore, that can be said of an indorsement of negotiable paper is, that from it there is implied a contract to pay, on condition of the usual demand and notice; and that this implication is liable to be changed on the appearance of circum-

stances inconsistent with it, whether those circumstances be shown orally or in writing.

But it may well be questioned whether the condition of demand and notice is truly part of the contract, or only a step in the legal remedy upon it.

If it is part of the contract, how can it be effectually dispensed with without a new contract for a sufficient consideration, especially after the maturity of the note? Yet there are decisions without number that a waiver of it during the currency or after the maturity of the note will save from the consequences of its omission. This could not be if it was a condition of the contract, for then the omission of it would discharge the indorser both morally and legally; and no new promise afterwards, even with full knowledge of the facts, could be of any validity.

If, however, an indorsement without other circumstances be regarded as an implied contract to pay, provided the holder use such diligence that the indorser lose nothing by his negligence or indulgence, then it accords with all these decisions. Then the law, and not the contract, declares the usual demand and notice to be in all cases conclusive, and in some cases necessary, evidence of such diligence. The law imposes no vain duties, and its general rules are subjected to exceptions in order to dispense with them; but it does not thus deal with contract duties. It is therefore perfectly consistent in declaring that an indorser is bound by a new promise, after he knows of the omission of demand and notice, for this is an admission that he was not entitled to it, or has not suffered for want of it. It declares demand and notice necessary, in some cases, to save the indorser from loss, and it declares that his own admission may be substituted for them.

It seems, therefore, that the duty of demand and notice, in order to hold an indorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time, in accordance with the maxim, *Quilibet potest renunciare juri pro se introducto*. And certainly an indorsement is not regarded as a written contract so far as to prevent oral proof that its terms differ from the ordinary contract of indorsement.

The first reserved point ought, therefore, to have been decided in favor of the plaintiff, and this would have entitled her to judgment on the verdict.

JUDGMENT.—This cause came on for hearing on a writ of error to the district court of Allegheny county, and was argued by counsel. And now, in consideration thereof, it is considered,

adjudged, and decreed that the judgment of the said court be reversed, and that judgment be entered on the verdict in favor of the plaintiff below, with interest from the date of the verdict, and with costs. And it is further ordered that the record be remitted to the said district court, with directions to carry this judgment into execution.

WAIVER OF RIGHT TO DEMAND AND NOTICE ON PART OF INDORSER MAY BE PROVED BY PAROL TESTIMONY. The doctrine that it may be proved by parol testimony that the indorser of a promissory note, at the time of the indorsement, agreed to be absolutely bound to the payment of it, without the usual demand and notice, is sustained by the great weight of authority in this country: Story on Prom. Notes, sec. 148; 1 Parsons on Notes and Bills, 584; 1 Daniel on Neg. Inst., sec. 719 a; 2 Id., sec. 1093; Edwards on Bills and Notes, 635; *Fuller v. McDonald*, 23 Am. Dec. 499, note 504; *Hibbard v. Russell*, 41 Id. 733; *Sanborn v. Southard*, 43 Id. 288; *Hazard v. White*, 26 Ark. 155; *Farmers' Bank v. Waples*, 4 Harr. (Del.) 429; *Free v. Kierstead*, 16 Ind. 91; *Pollard v. Bowen*, 57 Id. 232; *Schnied v. Frank*, 86 Id. 250; *Cheshire v. Taylor*, 29 Iowa, 492; *Wall v. Bry*, 1 La. Ann. 312; *Boyd v. Cleveland*, 4 Pick. 525; *Central Bank v. Davis*, 19 Id. 373, 375; *Lane v. Steward*, 20 Me. 98; *Whitney v. Abbott*, 5 N. H. 378; *Edwards v. Tandy*, 36 Id. 540; *Sheldon v. Horton*, 43 N. Y. 93; S. C., 3 Am. Rep. 669; *Dye v. Scott*, 35 Ohio St. 194; S. C., 35 Am. Rep. 604; *Struthers v. Blake*, 30 Pa. St. 139; *Sherer v. Easton Bank*, 33 Id. 134; *Taylor v. French*, 2 Lea, 257; *Power v. Mitchell*, 7 Wis. 161; *Union Bank v. Hyde*, 6 Wheat. 572; contra: *Piscataqua Exchange Bank v. Carter*, 51 Am. Dec. 217; *Rodney v. Wilson*, 67 Mo. 123; *Beeler v. Frost*, 70 Id. 185. Doubts have been entertained on this point, but they have been mostly resolved in favor of the admissibility of the parol testimony, as will be seen from the extracts following: "Sometimes the indorsement contains a written agreement to dispense with any demand upon the maker, or with notice of the dishonor, if the note is not duly paid. In such cases the indorser will be liable thereon, not only to his immediate indorsee, but to every subsequent holder; for the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement. And this proceeds upon the just maxim, *Quilibet potest renunciare juri pro se introducto*. But where the agreement is not on the face of the indorsement, but is merely oral between the indorser and his immediate indorsee, the effect would seem to be limited to the immediate parties; and even here doubts have been entertained whether the evidence is admissible between them, since it has been thought to vary and control the ordinary obligations of an indorsement. These doubts have, however, been overcome in America; and the doctrine is established that such evidence is admissible:" Story on Prom. Notes, sec. 148. Parsons says: "There has been some conflict on the point whether a parol promise to pay the note, made at the time of indorsing, or a parol agreement between the parties that payment should not be demanded until after maturity, is admissible to prove a waiver of demand and notice. Some of the earlier cases deny its admissibility, on the ground that the indorsement is a written contract that regular demand shall be made and notice given, which can not be waived by a contemporaneous parol agreement. But we do not think this to be law, and are of opinion that the evidence may be introduced, because the contract is not that demand shall be made and notice given, but that due

diligence shall be used; and evidence is admissible to prove that such diligence has been used;" 1 Parsons on Notes and Bills, 584.

Daniel says: "It is conceded on all sides that a verbal waiver is as effectual as a written one; and the weight of authority sustains the proposition that a parol promise to pay the note absolutely, made by the indorser at the time he indorses it, or a promise to pay it if the maker does not, or a verbal agreement between the parties that payment should not be demanded until after maturity, is admissible to prove a waiver of demand and notice. Such evidence is not offered for the purpose of varying the written contract of indorsement, which is simply to pay the note after exercise of due diligence against the maker, but to show that the parties have between themselves settled the amount of diligence to be required. It has been held differently, but the doctrine of the text seems more consistent with the principles upon which waivers are sustained." 2 Daniel on Neg. Inst., sec. 1093. And again he says: "It has also been held that it can not be shown that the indorser agreed at the time of the indorsement to be absolutely liable without demand and notice; but we concur with the authorities which sustain his freedom to waive his right to demand and notice at any time. He merely relieves the indorsee of the ordinary duties of diligence; of the necessity of certain acts to be done in future, which only impliedly are required, and which cease to be exacted by diligence when waived in advance." 1 Daniel on Neg. Inst., sec. 719 a. It will be noticed that Story does not state the ground or principle upon which the parol evidence is admitted in such cases. Parsons and Daniel seem to consider it admissible to prove that the amount of diligence which the contract of indorsement calls for has been used. And they appear to think that the introduction of such evidence does not contravene the rule that parol evidence is not admissible to vary the terms of a written contract. It must be confessed that this reasoning does not seem entirely satisfactory. If it is a part of the contract of indorsement that due diligence shall be used in order to bind the indorser, it is equally a part of the contract that such diligence consist of a certain demand succeeded by a certain notice, and it seems difficult to comprehend how that part of the contract can be varied by parol any more than could an express contract that demand shall be made and notice given. If either stipulation is really a part of the contract, parol evidence can not be admitted to vary it without violating the general rule. Daniel says that the evidence is admitted "to show that the parties have between themselves settled the amount of diligence to be required." But how have they settled it? Is it not by a parol agreement varying the terms of the written contract of indorsement? It would certainly seem so if the duty of due diligence has to be regarded as a part of the contract.

The reasoning of Judge Lowrie, in the principal case, on this question, is more satisfactory to our mind. If, as he contends, the duty of demand and notice, in order to hold an indorser, is not a part of the contract of indorsement, but merely a step in the legal remedy, then the introduction of oral testimony to show that it has been waived is not in contravention of the rule that parol testimony can not be received for the purpose of varying the terms of a written contract. The doctrine of the principal case on this point has been approved in several subsequent cases: *Struthers v. Blake*, 30 Pa. St. 139; *Sherer v. Easton Bank*, 33 Id. 142; *Pollard v. Bowen*, 57 Ind. 239; *Airey v. Pearson*, 37 Mo. 428; *Power v. Mitchell*, 7 Wis. 161. In delivering the opinion of the court in *Struthers v. Blake*, 30 Pa. St. 142, Porter, J., said: "The duty of demand and notice is not a part of the contract of indorsement, but a step in the remedy; for otherwise, notice could not be waived

without a new contract for a sufficient consideration; and a new promise without consideration, even with full knowledge of the facts, would be invalid." Holmes, J., delivering the opinion of the court in *Airey v. Pearson*, 37 Mo. 428, said: "Demand and notice have been held to be no part of the contract of the indorser, but merely a step in the legal remedy, which may be waived even by parol"—citing the principal case. And Niblack, J., in *Pollard v. Bowen*, 57 Ind. 239, after quoting the greater part of the opinion in the principal case, said: "The doctrine thus enunciated appears to have been fully recognized in several cases heretofore decided by this court, and to have been accepted for many years as the law in this state." And he adds: "For reasons already given, we regard the rule above laid down in the case of *Barclay v. Weaver*, *supra*, as equally applicable to checks and bills of exchange." In that case the court accordingly decided that demand for the payment of a check and notice of non-payment of it are no part of the contract between the drawer and payee, but are steps in the legal remedy of the latter.

It is well settled by authority that the waiver of demand and notice does not require any new consideration: *Neal v. Wood*, 23 Ind. 523; *Hughes v. Bowen*, 15 Iowa, 446; *Cheshire v. Taylor*, 29 Id. 492; *Coddington v. Davis*, 3 Denio, 16; *Sheldon v. Horton*, 43 N. Y. 93; S. C., 3 Am. Rep. 669. And it is held that the waiver is not a new contract: *Edwards on Bills and Notes*, 634; *Power v. Mitchell*, 7 Wis. 161. Waiver of demand and notice is not within the statute of frauds, and may be made by parol: *Power v. Mitchell*, *supra*; *Boyd v. Cleveland*, 4 Pick. 525.

If the doctrine of the principal case, that the duty of demand and notice is not a part of the contract, be accepted, then the reason why a waiver of such demand and notice is not a new contract, and does not require a new consideration to support it, becomes plain.

PAROL EVIDENCE TO VARY EFFECT OF INDORSEMENT GENERALLY: See *Sanborn v. Southard*, 43 Am. Dec. 288, note 289, where the prior cases in this series on this subject are collected. And see *Hill v. Ely*, 9 Id. 376, note 381, where this subject is discussed at some length.

THE PRINCIPAL CASE IS CITED in support of these propositions in the following cases: Notice is sometimes excused where it can be of no use to the indorser: *Foland v. Boyd*, 23 Pa. St. 477; *Groth v. Gyger*, 31 Id. 273. The contract of indorsement is one implied by law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties: *Ross v. Espy*, 66 Id. 483; S. C., 5 Am. Rep. 394; *Hollon v. McCormick*, 45 Ind. 415. A party may waive a condition during the currency of it: *Lycoming Co. M. Ins. Co. v. Schollenberger*, 44 Pa. St. 261. Any act of the indorser calculated to put the holder off his guard, and treat the note otherwise than he would have done, is, in judgment of law, a waiver of demand and notice: *Sheldon v. Horton*, 53 Barb. 27. Where a guarantor, after the failure of the principal, promises to pay the debt, this is an admission of his liability, and a waiver of any delay by the creditor, and entitles the creditor to recover: *Tinkum v. Duncan*, 1 Grant Cas. 230. Where a party is discharged from liability by want of notice, responsibility can not reattach to him without proving an authority in his agent to waive the notice, or a new consideration to sustain it: *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 200. Parol evidence is admissible to rebut a presumption or an equity: *Musselman v. Stoner*, 31 Id. 270.

RANKIN v. SIMPSON.

[19 PENNSYLVANIA STATE, 471.]

WHERE DECREE FOR SPECIFIC EXECUTION OF CONTRACT FOR SALE OF LANDS is sought, the contract must be proved.

CONTRACT CAN NOT BE PROVED BY DECLARATIONS of the parties thereto where those declarations stand opposed to each other.

Possession CONSIDERED AS EVIDENCE OF PAROL CONTRACT for the sale of land, and as part performance to take it out of the statute of frauds, must not only be delivered and taken, but must be maintained, in pursuance of such contract. And if a purchaser by parol takes possession under his contract, and afterwards attorns to the vendor as landlord, or fixes upon himself any other character than that with which he entered, he lets go his equities, and his possession is referred to his new agreement.

PARTY WHO EXECUTES CONTRACT FOR PURPOSE OF DEBRAUDING his neighbor will not be protected against it when it is used against himself.

ERROR to the common pleas of Indiana county. Ejectment.
The opinion states the facts.

Banks and Drum, for the plaintiffs in error.

White and Foster, for the defendants in error.

By Court, Woodward, J. This is another case under the statute of frauds and perjuries, and many of the observations made in the case of *Moore v. Small*, 19 Pa. St. 461, decided at the present term, are applicable here. The plaintiffs, having the legal title to the land, instituted this action of ejectment to recover the possession. The defendants resisted the plaintiffs' right to recover, on the ground that William Rankin, the father of the plaintiffs, in his life-time, made a parol sale of the land to Andrew Simpson, in consideration of his moving on the farm and taking care of Margaret Rankin, an insane sister of William Rankin, and that he had fully performed the contract on his part. The defendants are to be regarded as standing in a court of chancery, asking for a decree of specific execution of the alleged contract. They ask, in effect, that the legal title of the plaintiffs shall be conveyed to them.

Their case rests in parol, and *prima facie* is within the statute of frauds and perjuries. The burden of taking it out of the operation of that beneficial statute is on them. How do they do it? By proving the declarations of William Rankin to indifferent parties that he had made such an arrangement with Simpson, and that Simpson had taken possession in pursuance of the contract.

But the plaintiffs meet this by proving Simpson's declarations that the farm was not his, but Rankin's, and that he had the use of it for taking care of the idiot sister. A contract is the agreement of two or more minds on a sufficient consideration to do or not to do a certain thing, and when it is to be proved by the declarations of the parties, and these declarations stand opposed as the poles of a needle, how can a contract be said to be proved? Where was the occurrence, the agreement of the two minds? No witness was present when it took place.

The persons who heard the parties talk about it understood one thing from Rankin and another from Simpson. Rankin accounted for Simpson's possession as a purchaser. Simpson insisted he was a renter; and now, on Rankin's declarations, and in opposition to his own, he asks that the title be decreed to him. It is time that such demands should cease to be countenanced.

If a party call on courts to execute parol contracts for land in spite of the statute of frauds and perjuries, let him prove a contract. Because he can find persons who remember the owner's loose or casual declarations indicative of a sale, shall he have a decree in disregard of the statute, and in opposition to his own declared convictions? The chancellor has never lived who would tolerate such a demand. Patents and deeds and wills would be a solemn mockery if they might be trifled with and set aside in this manner.

But the plaintiffs show more infirmities still in the claim set up by the defendants for the legal title.

On the first day of September, 1834, Simpson, being then in possession of the farm, entered into a written agreement with Rankin, by which he agreed "to farm the place whereon he now lives for the said William Rankin for the term of six years from this date, and also to keep Margaret Rankin in sufficient boarding, washing, and lodging for the above term, and also keep and take sufficient care of all the horses and cattle that may be put under his care by said Rankin; also keep the place in good repair; also thrash and sell all the grain he may raise each and every year, and deliver the same to said Rankin, for the consideration of two hundred dollars for each year."

On the twentieth day of July, 1841, a written renewal of this contract was made for another six years, on similar terms, but in consideration of one hundred and seventy-five dollars per annum. Then followed Simpson's annual receipts to Rankin for two hundred dollars, "in full for attending his farm for the

last year," for the years 1835-1840, and for one hundred and seventy-five dollars for the years 1841-1843.

These written papers were not only strongly corroborative of Simpson's declarations that the place was Rankin's, and not his, but the court ought to have considered them decisive against the claim for equitable relief.

Whatever the contract under which the possession was originally taken, it was cut up and displaced by the agreement of the first of September, 1834. Thenceforth the possession was referable to that agreement, and Simpson was estopped from alleging a precedent and inconsistent parol agreement. When the terms of an agreement are reduced to writing, the document itself, being constituted by the parties the true and proper expositor of their admissions and intentions, is the only instrument of evidence in respect to that agreement which the law will recognize, so long as it exists for the purposes of evidence: 2 Stark. Ev. 767. Possession considered as evidence of a parol contract, and as part performance to take it out of the statute, must not only be delivered and taken, but must be maintained in pursuance of the parol contract. Hence, if a purchaser by parol take possession under his contract, and afterward attorn to the vendor as landlord, or fix upon himself any other character than that with which he entered, he lets go his equities, and his possession is referred to his new agreement. And where the agreement, as in this case, is reduced to writing in terms perfectly inconsistent with the idea of a parol sale, it becomes the most faithful memorial which ingenuity can devise or the law adopt.

The demand here for specific execution is bold. To execute a parol contract against an express statute is the exercise of a large power; but to execute it without competent proof of its existence, without the established test of its part execution, and against the declarations of the party asking for it, as well as against the highest written evidence in his power to create, would be a wild stretch of authority, which no court of law or equity ought to make.

If anything could make the defendants' case worse than the proofs make it, it would be the reason assigned for the written contracts of 1834 and 1841—that they were merely designed to cloak the produce of the farm from the grasp of creditors. He who seeks equity must do equity. He must come into court with clean hands. If he have made an instrument to defraud his neighbor, he can not call on the court to protect him when it is used against himself.

For the most part, the charge of the court was correct, but in submitting such a case as this to the speculations of a jury, they were in error, and the judgment is reversed and a *venire de novo* awarded.

DELIVERY OF POSSESSION PURSUANT TO CONTRACT IS PART PERFORMANCE:
Kerr v. Day, 53 Am. Dec. 526, note 532; *Pugh v. Good*, 37 Id. 534, note 541, where other cases are collected.

AGREEMENT MUST BE CLEARLY PROVED to entitle a party to specific performance: *Aday v. Echols*, 52 Am. Dec. 225, note 229, where other cases are collected; *McCue v. Johnston*, 25 Pa. St. 308, citing the principal case; *Hudson v. Layton*, 48 Am. Dec. 167, note 172, where other cases are collected; *Hazelton v. Putnam*, 54 Id. 159.

COURTS REJECT ALL EVIDENCE OF VERBAL CONTRACT FOR SALE OF LAND, where, if such evidence be taken as true, it does not make out such a case as is entitled to stand as an exception to the statute of frauds: *Poorman v. Kilgore*, 26 Pa. St. 370; *Todd v. Campbell*, 32 Id. 252, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Zimmerman v. Wengert*, 31 Pa. St. 405, to the point that where a party lets go the equities under which he entered, no chancellor will compel the specific execution of a parol sale; and in *Baltimore & Ohio R. R. Co. v. Hoge*, 34 Id. 222, to the point that the rules in regard to the submission of facts to the exclusive action of juries, in cases of parol sales of land, seem to be more restricted than they formerly were.

HOLLIDAY v. WARD.

[18 PENNSYLVANIA STATE, 485.]

REGISTER, AS TO PROBATE OF WILL, IS JUDGE, and the admission of a will to probate is a judicial decision.

JUDGMENT OF REGISTER IN FAVOR OF WILL IS EVIDENCE OF ITS VALIDITY in all respects whatever, conclusive as to personal property, and presumptive as to real property. Such judgment can only be set aside on appeal, and can not be impeached in any other proceeding.

VALIDITY OF WILL IS INFERRRED BY LAW FROM REGISTER's DECISION itself, and not from the evidence on which the decision was based.

VALIDITY OF WILL, SO FAR AS IT AFFECTS REALTY, MAY BE CONTRADICTED and disproved in ejectment or partition, by showing that it was not legally executed, or that the testator was, at the time of making it, insane, under duress, or influenced by the fraudulent practice of some interested party.

WHERE WILL HAS BEEN APPROVED BY REGISTER, it is still no more than *prima facie* evidence of its validity in a subsequent ejectment for land devised by it; but no court will look into the evidence given on the trial of the issue and reject the will altogether if it appears that an interested witness had been examined.

WHEN STATUTE GIVES JURISDICTION OF ANY SUBJECT TO ORPHANS' COURT, it impliedly prohibits the other courts from taking cognizance of it. And therefore the jurisdiction which the act of 1833 has given to the orphans' court over the subject of advancements is exclusive.

ERROR to the common pleas of Erie county. Ejectment brought by S. H. Ward and others against Samuel Holliday and William Holliday to recover a tract of land in Erie county. Samuel Holliday, sen., was seized of the land in dispute at the time of his death. The plaintiffs were grandchildren and the defendants were children of said Samuel Holliday, sen. The plaintiffs claimed in right of their mother, contending that the other children of said Samuel Holliday, sen., had been advanced in land by him, to the amount of their respective shares in his estate. The other facts appear from the opinion.

Babbitt and Marshall, for the plaintiffs in error.

By Court, BLACK, C. J. The title of the defendants below to the land in dispute, or a part of it, depended on a will which had been proved before the register. No evidence was offered on the other side to show that the will was not properly executed, or that the testator was incapable of making one. But the court charged that, inasmuch as one of the witnesses who had been sworn before the register was a devisee, and therefore interested, the will was destitute of the necessary evidence of authenticity, and not sufficient to pass title. A written renunciation of his rights under the will made by the witness before probate was offered by the other party, but was rejected.

A register is a judge, and the admission of a will to probate is a judicial decision. His judgment, if it be in favor of the will, is evidence of its validity in all respects whatever, conclusive as to personal property, and presumptive as to real. Such judgment can only be set aside on appeal, and is unimpeachable in any other proceeding. The validity of the will is a fact which the law infers from the decision itself of the register, and not from the evidence on which that decision was based. A judge before whom the will comes collaterally, proved and approved by the proper authority, has no right to reject it because it may seem to him that the probate was allowed on the testimony of an incompetent witness, or on proof that was insufficient. Its validity, so far as it affects realty, may be contradicted and disapproved in ejectment or partition by showing that it was not legally executed, or that the testator, at the time of making it, was insane, under duress, or influenced by the fraudulent practice of some interested party. But though the presumption which arises out of the record may be thus repelled, it does not follow that the record itself can be treated as a nullity. Where the will has been approved by the register in pursuance of a

decision in its favor, or an issue sent to the common pleas, it is still no more than *prima facie* evidence of its validity in a subsequent ejectment for land devised by it: but certainly no court would look into the evidence given on the trial of the issue, and reject the will altogether, if it appeared that an interested witness had been examined. In such a case the evidence can not accompany the record of the judgment; neither can it when the proof is heard before the register's court, and it need not when it is taken before the register himself. His attestation may be a simple certificate that the will was proved and approved. Whether the certificate sets out no evidence at all, or evidence insufficient, the will must be received if the register has not condemned it. It is not usual to enter a formal decree of probate on the record; but the want of it is not fatal. It will be presumed from the issuing of letters testamentary, or perhaps from any other act of the register which he would have no legal right to do in a case where proof of the will had failed. The existence of such a decree does not appear to have been questioned in this case.

I have not cited cases for each principle here asserted. But I might have done so, for they are very abundant. Our own decisions on the subject may be found (by those who think that reason is not strong enough without authority) in *Coates v. Hughes*, 3 Binn. 498; *Spangler v. Rambler*, 4 Serg. & R. 193; *Miller v. Carothers*, 6 Id. 223; *Smith v. Bonsall*, 5 Rawle, 80; *Asay v. Hoover*, 5 Pa. St. 21 [45 Am. Dec. 713]; *Rowland v. Evans*, 6 Id. 435; *Miller v. Meetch*, 8 Id. 417; *Thompson v. Thompson*, 9 Id. 234. *Loy v. Kennedy*, 1 Watts & S. 396, bears a strong resemblance to this case in many of its features.

On the whole, we are of opinion that the will was properly admitted in evidence, and being so admitted, it ought to have been treated as a valid testamentary writing. The burden was on the defendant to show illegal execution, insanity, duress, or fraud; and in the absence of such proof the probate, whether defectively taken or not, was sufficient for all the purposes of the party offering it.

The renunciation or release of the witness was rejected rightly enough; for it was wholly irrelevant. The argument on the question, whether it was good without a seal, was a mere waste of learning and time.

A question of much graver import remains to be disposed of. Can the advancements made by an ancestor be ascertained in an ejectment brought by one heir against another? By the act of

1833 jurisdiction of this subject is given to the orphans' court. Is that jurisdiction exclusive, or only concurrent with the common-law courts?

A manuscript case, determined here several years ago, was produced at the argument by the counsel of the defendant in error, but it proves nothing; for it is not possible to say from the record whether the point was made or not. In *Phillips v. Gregg*, 10 Watts, 158 [36 Am. Dec. 158], which was an ejectment by one heir against others, the defendants gave evidence in the district court of advancements to the plaintiff. But the cause was ruled in this court on other grounds. In *Ernest v. Ernest*, 5 Rawle, 219, though the question may not have received much consideration, it can not be denied that it arose fairly and was decided. It was an action against an administrator for a distributive share of the balance in his hands, and the defendant was permitted to prove that the plaintiff had been advanced, and thus defeat his recovery to the extent of the advancement.

The difficulties which stand in the way of doing prompt, speedy, and pure justice in such a dispute anywhere except in the orphans' court are insurmountable. The *argumentum ab inconvenienti* was never more irresistible. If a simple case like that of *Ernest v. Ernest, supra*, can be tried in a common-law action, so may (and so must be, if either party wills it) the most complicated one that arises. Juries are less competent to state an account requiring long calculations than for any other duty that could be assigned them. It requires the leisurely deliberation of auditors chosen for their skill and experience. All the heirs are equally interested in advancements made to one. When the question is decided in an action between two, it concludes nothing as to the other, for none are bound by the judgment except those who are parties to it. Where there are six heirs, there must be at least five suits before it can be said that all are heard. If they are ejectments, they may be multiplied by three; and since estoppels must be mutual, each one may refuse to be satisfied until he has had a trial with every other one. Each jury would probably decide the case differently, and one of the conflicting verdicts would be entitled to as much respect as another. A life-time spent in litigation like this might end in swallowing up the estate, but not in settling the dispute. Again, when an ejectment is brought for land of greater value than the advancement, what shall be the measure of the verdict? By what rule shall land be set off against

money? How, indeed, can it be done at all even if the value of land were as easily ascertained as that of dollars, where it can not be divided into parts without spoiling the whole? These considerations make the advantage very manifest of the orphans' court jurisdiction, where all the parties can be brought in and the whole matter disposed of in one proceeding; where auditors can be appointed to collect and report upon the facts, where a simple issue can be framed and sent to a jury to try those which are doubtful; and where the final decree can be molded so as to fit the circumstances and do complete justice.

Besides, we think that all jurisdiction of the subject is taken away from the common pleas by a plain and positive statute. The act of 1833 gives the parties their remedy in the orphans' court, and clothes that tribunal with full power to adjudicate between them. This, construed in connection with the act of 1806, which requires that all statutory remedies shall be strictly and exclusively pursued, is the same as if the common-law jurisdiction had been expressly forbidden. The judiciary was slow in giving to the statute of 1806 its true interpretation. But the struggle which the courts made to defeat the just and wise purpose of the legislature is over, and now we read the law as it is written.

Notwithstanding all this, we might hesitate somewhat if we did not believe that the number, weight, and value of the judicial authorities were in favor of the same view. Although *Ernest v. Ernest, supra*, is the only case in which the very point, *eodem nomine*, has been decided, yet the same principle has been ruled in many other cases precisely analogous. The question is whether the act of assembly which gives the orphans' court jurisdiction takes away all other modes of proceeding. In a series of decisions, beginning with *Craven v. Bleakney*, 9 Watts, 19, and ending with *Mohler's Appeal*, 8 Pa. St. 26, it was laid down that a legacy charged on land could be recovered only in the orphans' court. In *Thomas v. Simpson*, 3 Id. 60, it was held that a widow's action for dower in land, of which her husband died seised, could not be maintained at common law. And in *Myers v. Black*, 17 Id. 199, it was declared that a contract for the sale of lands could not be enforced by ejectment after the vendor's death. These decisions are all grounded on the principle that when a statute gives jurisdiction of any subject to the orphans' court it impliedly prohibits the other courts from taking cognizance of it. We can not say, therefore, that the jurisdiction which the act of 1833 has given to the orphans'

court over the subject of advancements is not exclusive, unless we disregard almost the whole current of authority, set a statute at naught, destroy the symmetry of our judicial system, and establish a doctrine which must result in making justice wholly unattainable in a large and important class of cases.

From what I have said, it follows that the plaintiffs are not entitled in right of their mother to recover more than one sixth of the land as to which their grandfather died intestate. No question about advancements can be made in this cause. It would be premature to decide whether the point ruled in *Eells' Estate*, 6 Pa. St. 457, will make it necessary to have partition in the common pleas, after they get judgment here for their share. It may not, however, be improper to say that we incline to the opinion that if judgment be in their favor, they may consider themselves in the same condition they would have been in if no adverse claim had been made by either of the heirs. Nor do we see why a dispute about the tenure, if one should arise, may not be determined by an issue sent to the common pleas from the orphans' court. But we are not to be bound by anything now said on that subject.

Judgment reversed, and *venire facias de novo* awarded.

VERDICT AND JUDGMENT IN FAVOR OF WILL, CONCLUSIVENESS OF: See *Jesse v. Parker*, 52 Am. Dec. 102.

CONCLUSIVENESS OF PROCEEDINGS IN ORPHANS' COURT: See *McDade v. Burch*, 50 Am. Dec. 407, note 411, where other cases are collected. The judgment of the register admitting a will to probate is a judicial act, and its sufficiency is not examinable in a collateral proceeding: *Lovett's Ex'r's v. Matthews*, 24 Pa. St. 332, citing the principal case.

DECREES OF PROBATE COURT, CONCLUSIVENESS OF: See *Bailey v. Dilworth*, 48 Am. Dec. 760; *Green v. Creighton*, Id. 742, note 744, where this subject is discussed at length; *Palmer v. Oakley*, 47 Id. 41.

IN ACTION OF EJECTMENT, PROBATE OF WILL CAN NOT BE INVALIDATED by looking into the evidence on which the decree was founded: *Shinn v. Holmes*, 25 Pa. St. 144; *Barker v. McFarran*, 26 Id. 214; *Kenyon v. Stewart*, 44 Id. 188, all citing the principal case.

ORPHANS' COURT HAS EXCLUSIVE JURISDICTION over questions of advancements and distribution: *Hughes' Appeal*, 57 Pa. St. 181; *Girard L. I. Co. v. Wilson*, Id. 184; *Musseman's Appeal*, 65 Id. 486, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Porter v. Dougherty*, 25 Pa. St. 407, to the point that the orphans' court has exclusive jurisdiction of a suit to enforce the specific performance of a contract for the sale of land made by a deceased person; and in *Bradfords v. Kent*, 43 Id. 482, to the point that the common-law remedy is not available where a statutory one has been given.

BEATTY v. WRAY.

[19 PENNSYLVANIA STATE, 516.]

SURVIVING PARTNER IS NOT ENTITLED TO COMPENSATION FOR WINDING UP the partnership business.

ERROR to the common pleas of Armstrong county. This was an amicable action of account render brought by Robert Wray as administrator of the estate of E. Kirkpatrick, deceased, against Robert Beatty, who had been a partner of the plaintiff's intestate up to the time of his death. After the death of Kirkpatrick Beatty began to wind up the business of the firm. He set up a claim before the auditor for an allowance as compensation to him for his time and trouble in closing up the business of the firm. Plaintiff's counsel objected to the claim, and asked for an issue at law to be certified. This was done, and judgment was rendered for the plaintiff. To this judgment error was assigned.

Fulton, for the plaintiff in error.

Lee, for the defendant in error.

By Court, Gibson, J. This case presents so few salient points that it is difficult to deal with it; yet it rests on principles and analogies that may conduct the mind to a satisfactory conclusion. At the formation of a partnership, its dissolution by death is rarely contemplated. It is an unwelcome subject; for no man who enters on a speculation can bear to think he may not live to finish it. Hence the contract is usually framed for operations during the proposed period; and when the parties anticipate the expiration of it, they dispose of the unfinished business by a new arrangement. Consequently, in articles or a parol contract of partnership, there is seldom, if ever, an express provision for a case like the present; and where compensation is not allowed a surviving partner by a commercial custom, the contract, based on the law of partnership, binds him by an implied covenant or promise to settle the accounts, pay the debts, and hand over a proportionate part of the capital and profits as his proper business. As each partner is clothed with all the power of the firm, each is burdened with all the duties of it; and when one of them dies, this power and these duties devolve on the survivor as the representative of the firm, or rather as the firm itself. Now the difficulty is to conceive how a party can entitle himself to a reward for doing what the law and his contract had bound him to do. According to

Thornton v. Proctor, 1 Anst. 94, a universal usage to allow a surviving partner for his agency in trading with the joint capital after the death would enter into the original contract of partnership and be one of the conditions of it; from which the inference is legitimate that if there be no such usage, the law enters into it and disposes of the contingency differently; and the same inference would be legitimate if there were a custom for it, in regard to a surviving partner's agency in closing the concerns of his firm. The parties may frame their contract on the basis of either; but where they treat without reference to the one or the other, it is reasonable to presume they had in view the law rather than a doubtful custom, of which there is not a trace in the books. It is not too much to assume that they left this very contingency to the law to determine which of them should have the miserable good luck to cast the burden of the unfinished business on his associate. It is settled by *Thornton v. Proctor*, already cited, *Bradford v. Kimberly*, 3 Johns. Ch. 436, and *Franklin v. Robinson*, 1 Id. 165, that there is no compensation for inequality of services rendered before the dissolution; and these cases are decisive of the present; for winding up, which is the consummation of the contract and its business, is as much an affair of the firm as an original operation. A partnership dissolved even by efflux of time, like a banking corporation, continues to exist for the closing of its business. In *I'cacock v. Peacock*, 16 Ves. 57, it was said that there is a community of interest between partners after dissolution; on the authority of which, a liquidating partner was allowed, in *Davis and Desauque's Estate*, 5 Whart. 539 [34 Am. Dec. 574], to bind the outgoing partner by a note discounted in the name of the firm to relieve its effects from the pressure of a ruinous execution. Was not the discounting partner laboring for the firm under the original contract, and could he have charged for his services in the transaction as piece-work?

Added to these considerations, it is of irresistible force that the reported cases afford no precedent for such an allowance; and that *Miller v. Anspach*, in the district court of Philadelphia, is the only one in which it was even claimed. If there had been a commercial custom to give color to it, it would have appeared in some of the decrees on bills to account. But analogous cases throw a strong light on the matter. It sometimes happens that a surviving partner continues the business with the partnership stock; and in *Burden v. Burden*, 1 Ves. & B. 171, such a survivor though allowed his expenses, was not allowed for his

trouble, Lord Eldon remarking, that had he carried on the trade for the benefit of the children under the articles but without an express stipulation for it, he would have been entitled to no more. But services in winding up are rendered for the benefit of the firm, under an implied covenant in the articles, or an implied promise where the contract is a parol one, as much as services after the death, under an express covenant or promise. Yet in the subsequent case of *Brown v. De Tastet*, 1 Jac. 284, the survivor was allowed to charge for his management. Surely, that case was not thoroughly considered. To involve the property of another in the chances of commerce, without his consent, is a wrong which can not find a right; and Lord Eldon was gratuitously liberal when he allowed the delinquent survivor his expenses; who, if he might charge when the business had been prosperous, might charge when it had been ruinous; and if he might charge for expense, he might, on every principle of consistency, charge for labor. If the business were carried on under a special provision for the children, it is admitted that he could not charge for his personal services; and if it were carried on without the authority of their parent, original or testamentary, he would have involved them in the perils of mercantile adventure in his own wrong. In regard to that point, the English chancellors seem to have been guided by a sense of the hardship of the particular case, rather than by any fixed principle. In other respects their decisions in cases of subsequent trading have been remarkably stringent. The representatives of the dead partner have not only been allowed to elect between interest and the profits, but an inquiry has been directed to ascertain which would be the more advantageous. The rule holds in all other cases of trust. An executor has never been allowed a commission on profits; but on the contrary, has been charged either legal or chancery interest. A surviving partner takes the legal title to his dead partner's share of the effects as a trustee; and it is a rule of the courts in England not to allow a trustee compensation; but though this rule is relaxed in Pennsylvania, and perhaps most of the other states, it has not been relaxed so far as to allow compensation to one who has abused his trust.

At first view, it might seem unjust that a co-operator should contribute more than his share to the success of an enterprise without remuneration for the excess; but his share depends on the nature of the bargain. By the contract of association, every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and

without comparison of values; for services to the firm can not, from their very nature, be estimated and equalized by compensation of differences. They are inappreciable, and unsusceptible of specific charge. A partner could not keep an account of every hoop or nail driven by him; and if this be the nature of services to the firm before dissolution, it is the nature of services to the firm after it. A partner might as well pretend to charge for doing his partner's duties during sickness or temporary insanity, which does not necessarily work a dissolution of the partnership, as to charge for doing what his dead partner might have possibly done had he lived. The difference is, that the disability is temporary in the one case and perpetual in the other; but the legal consequences of it between the partners are the same.

Judgment affirmed.

SURVIVING PARTNER IS NOT ENTITLED TO CHARGE COMPENSATION for services rendered in settling the partnership business: *Brown v. McFarland's Ex'r*, 41 Pa. St. 133; *Gyger's Appeal*, 62 Id. 80; *Griggs v. Clark*, 23 Cal. 430; *Tillotson v. Tillotson*, 34 Conn. 366, all citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Marsh's Appeal*, 69 Pa. St. 33, to the point that every partner is bound to work to the extent of his ability for the benefit of the partnership, without regard to the services of his copartners, and without comparison of value.

McCoy v. DANLEY.

[20 PENNSYLVANIA STATE, 85.]

APPROPRIATION OF ANOTHER'S PROPERTY TO ONE'S OWN USE IS NOT ALLOWED even for a temporary purpose.

ONE WHO ERECTS DAM ON HIS OWN LAND IS RESPONSIBLE FOR ALL INJURY caused by it to the land of another in times of usual, ordinary, and expected freshets.

DAMAGES SUCH AS WILL PUNISH DEFENDANT AND COMPEL HIM TO ABATE NUISANCE are bound to be awarded to the plaintiff in a suit for the continuance of the nuisance, after a recovery in a former action, notwithstanding the erection complained of was of great value to the defendant, and the injury to the plaintiff was insignificant.

CASE for the continuance of a nuisance. The plaintiff had previously brought an action against the defendant to recover damages for an injury caused to the plaintiff's land by back-water from a dam erected on the defendant's land, and had recovered a verdict and judgment in that action. The defendant having neglected and refused to abate the nuisance, the present

action was brought, in which the defendant had a verdict and judgment. The errors assigned by the plaintiff sufficiently appear in the opinion.

Acheson and Wilson, for the plaintiff in error.

Montgomery, for the defendant in error.

By Court, BLACK, C. J. This was an action on the case for erecting a dam by which the water of the stream was penned back so as to overflow the plaintiff's land above. Evidence was offered to show the injury which had been caused by the structure at times of ordinary and natural rises in the stream; at regular and periodical rises; at times of high water occurring at the usual flood seasons; and at times of ordinary and common freshets. All this was rejected, and the court held in the charge that there could be no recovery except for damage done by swelling back the water at its ordinary stage, and this was defined to be that situation in which it remains longest, excluding the dry season.

We find no authority for this rule. One objection to it is the extreme difficulty of its application. In this country there is no dry season, properly so called. We have periods of drought, which come irregularly and at all times of the year. The streams rise immediately after a rain or the melting of the snows, and the fall begins as soon as the rise ceases. That they ever remain in one situation for a perceptible length of time would be hard to prove. If they do, it would require an observation so close and so constant to know in what situation they remain longest, that no person of ordinary habits could be expected to tell it. No two witnesses would be likely to agree even upon their average height during a given time.

But suppose the ordinary situation of a stream, according to this definition of it, could be ascertained with tolerable accuracy, we think a dam which backs the water on the land of the proprietor above during every spell of wet weather is something more than *damnum absque injuria*. If not, a man whose farm consists of a low creek bottom is at the mercy of his neighbor below. His trees may be killed, his crops destroyed, his springs drowned, his house rendered uninhabitable, and his land made worthless, not only while the overflow lasts, but by the pools of stagnant water left standing on it afterwards. And all this must be the necessary consequence, not of great floods, which, like other inevitable calamities, are to be borne without complaint, but of every ordinary freshet caused by the usual rains

which are expected with as much confidence as we look for the return of summer and winter. The law would be very defective if it did not protect men from wrongs like these in rainy as well as in dry seasons; and since every year brings its alternations of high water and low, a person who erects a dam is bound to foresee the one as much as the other. It often happens that small mills for grinding, sawing, or other purposes are erected on streams too weak to turn them except at high water. Suppose two such mills are on the same creek, the owner of the lower one, according to the defendant's doctrine, can say to the other, " You may use your machinery, if you can, when there is not water enough to drive it, but when the rise comes, I claim the right, and will exercise it, to pen the water back upon you and stop your wheel." If one party may do this with impunity, and the other must submit without a remedy, what becomes of the maxim, *Sic utere tuo ut alienum non laedas?*

The opinion in the case of the *Monongahela Navigation Company v. Coon*, 6 Pa. St. 379 [47 Am. Dec. 474], which seems to have misled the court of common pleas, does not go the whole length, they seem to have thought. The judge who delivered that opinion speaks throughout, not of the usual high water, but of floods which occur on extraordinary occasions. Besides, the point was not before him at all; and he was not required to speak with precision. The only point decided there which makes that case akin to this one was, that under the act of assembly the defendants were responsible for all damage caused by their dam under all circumstances. The remarks about the rights and duties of riparian proprietors differently situated were but *obiter dicta*; and there is nothing in them from which we infer that the court then considered a common freshet, such as may probably happen any month in the year to be an extraordinary occasion, of which one who built a dam was not required to calculate the effects.

But this question did arise in *Bell v. McClintock*, 9 Watts, 119 [34 Am. Dec. 507], and it was decided, not under the act making Oil creek a public highway (for the statute did not either create or change the rights of the parties), but according to the principles of the common law, that one who erects a dam is responsible for all the injury caused by it in times of usual, ordinary, and expected freshets. A flood is another thing. It may not come for years together. When it does come, it is a visitation of Providence, and the destruction it brings with it must be borne by those on whom it happens to fall.

This was a second suit for the same injury. The first had resulted in a judgment for the plaintiff. The court properly held that the record in the former case was decisive of the parties' rights. The plaintiff submitted that the jury were bound to find such damages as would punish the defendant, and compel him to abate the nuisance. But this the court denied to be law in a case where the erection complained of was of great value to one party, and the injury to the other insignificant. In this can not concur. The usufruct of water belongs to the owners of the land through which it passes. It is property to all intents and purposes. If one uses it in such a way as to prevent another, whose right is as good as his, from using it for a similar purpose, or if he interferes in any injurious way with its natural flow through the land of his neighbor above or below him, he is taking another man's property for his own purposes, and this he can never do without a contract. He who desires to have a water right which does not belong to him must bargain for it, as he would do for anything else. The law will not allow the owner to be deprived of it because he does not use it profitably; nor compel him to part with it against his will, even for a full price. The plaintiff's right, therefore, to have the dam in question reduced, and to be restored again to the full enjoyment of his own property, was absolute, and in no manner or degree dependent on its value to his adversary, or the *quantum* of injury done to himself. The first action in such cases is generally brought to test the parties' rights. In the absence of malice or aggravating circumstances, compensatory damages are enough; for it can not fairly be presumed that any one would maintain a nuisance in the face of a judicial decision conclusively fixing its character. But if he will not abate it, he may be compelled to do so in a second action. And how shall he be compelled to do it, except by a verdict which makes it his interest? The point on this subject should have been answered in the affirmative, and the jury instructed to see, not only that the plaintiff lost nothing, but that the defendant gained nothing by disobedience of the law.

LOWRIE, J. The prevailing and controlling error in the trial of this cause is in holding that a man may erect a mill-dam on his own land so as to throw the water back to his neighbor's line, in the ordinary stage of the stream, even though the consequence be that in its natural and ordinary swellings in some seasons of the year his neighbor's land is overflowed. The cor-

rection of this error will, of itself, modify some other points ruled by the court below.

No man has a right to appropriate any portion of his neighbor's property to his own use, even for a temporary purpose. If he may take his neighbor's land at frequent and uncertain periods in every year, he may as well take it altogether, for his neighbor can not use it. If it is very important for him to have it, let him buy it. If he invades it improperly, let him suffer as a wrong-doer.

Ordinary: the error is in the use of that word. A distinction is taken between the ordinary stage of the water and at its ordinary stage at particular periods. The former is without meaning unless it means the average stage; for there is no ordinary stage of any stream in this country for the year round. A man may make his dam according to the ordinary, but not according to the average, stage of the stream. But what is the ordinary stage? That depends upon seasons and weather. The ordinary stage in ordinary rainy seasons is one thing, and in ordinary dry seasons is another. The ordinary stage in March is high, in August, low. The ordinary rises of streams are matters which every one is expected to provide against, because, with ordinary care, he can calculate upon them. The owner of a dam is not answerable for damages caused by his dam, combined with an act of providence. But an act of providence, in legal phraseology, means an accident against which ordinary skill and foresight is not expected to provide. It does not include those floods which happen so frequently that men of ordinary prudence are expected to calculate upon them; and against such swellings the defendant was bound to provide when he erected his dam; and if he did not do so, he should be compelled to lower it, if the plaintiff insists.

Judgment reversed and a new trial awarded.

RIGHTS AND LIABILITIES OF OWNERS OF DAMS.—It is not within the purview of this note to consider at all or to any great extent those rights and liabilities of owners of dams which do not essentially differ from the rights and liabilities of riparian proprietors in general. Certain questions concerning riparian rights have heretofore been treated in this series: See the note to *Gardner v. Newburgh*, 7 Am. Dec. 526, on property in water; and that to *Heath v. Williams*, 43 Id. 265, on prior appropriation of water of a stream.

OVERFLOWING OR OTHERWISE INJURING PROPERTY OF RIPARIAN PROPRIETOR OR OTHER LAND OWNER ABOVE.—While the general rule undoubtedly is that the owner of a dam may swell the water of a stream or pond, in its natural state, up to his neighbor's line, see *Mongahela Navigation Co. v. Coon*, 6 Pa. St. 379; S. C., 47 Am. Dec. 474, still his use of the water in such

a manner as to inundate or overflow the lands of a riparian proprietor or other land owner above, without having acquired a right to do so, is certainly contrary to the maxim, *Sic utere tuo ut alienum non laedas*, for which an action will lie: *Angell* on Watercourses, sec. 330; *Stout v. McAdams*, 33 Am. Dec. 441; *Pixley v. Clark*, 35 N. Y. 520; *Wright v. Howard*, 1 Sim. & Stu. 190, 193. In the last of these cases the vice-chancellor said: "Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years;" and so well is the law settled in this respect, that if one tenant in common of property upon which a mill is situated erects a dam below on the same watercourse, upon his several estate, and thereby flows the common property to the injury of his co-tenant, the latter may maintain an action against him: *Odiorne v. Lyford*, 9 N. H. 502; S. C., 32 Am. Dec. 387.

This rule is not confined to injuries by overflowing alone, but extends to damages caused by backwater percolating through the soil upon the lands of an adjoining proprietor: *Pixley v. Clark*, 35 N. Y. 520; *Marsh v. Trullinger*, 6 Or. 356; *Wilson v. New Bedford*, 108 Mass. 261; *Fletcher v. Ryland*, L. R., 1 Ex., 265; and to an interference with natural drainage: *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569; *Treat v. Bates*, 27 Mich. 390. So, also, if one erects a dam upon his own land, thereby creating a stagnant pond or pool, injuring, or likely to injure, the health of persons living near, an appropriate remedy will be granted against the nuisance: *Neal v. Henry*, Meigs, 17; S. C., 33 Am. Dec. 125; *Treat v. Bates*, 27 Mich. 390; *White v. Forbes*, Walk. Ch. 112; *Ogletree v. McQuaggs*, 67 Ala. 580; S. C., 42 Am. Rep. 112. In the first of these cases the following language is used by Reese, J.: "Every individual, indeed, has a right to make the most profitable use of that which is his own, so that he does not injure others in the enjoyment of what is theirs. And it is conceded also, that if one, in the cautious and prudent use of property, in a manner appropriate to its nature and character, produce some annoyance to his neighbor, such person, though sustaining some loss, has suffered no legal injury which can be redressed. But to dam up a stream, and create pools of stagnant water upon or near to the premises of another, poisoning the atmosphere, generating disease, and impairing the enjoyment of that most valuable of absolute rights, health, can not be called the cautious and prudent use of property in an appropriate matter. To do so is to violate the injunction, *Sic utere tuo ut alienum non laedas*." Many of the mill acts specially provide that dams shall not be allowed to be constructed thereunder, if injury of the health of the neighborhood is likely to result. And in *Luning v. State*, 2 Pinn. 215; S. C., 52 Am. Dec. 153, it was held that these acts did not warrant the building of dams so as to create a public nuisance in this respect. The extent of the injury caused by a wrongful overflow does not affect the right of action. Notwithstanding no actual injury has been sustained, nominal damages may be recovered: *Washb. on Easements*, 289; *Pastorius v. Fisher*, 1 Rawle, 27; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Casebeer v. Mowry*, 55 Pa. St. 419; *Eagle etc. Mfg. Co. v. Gibeon*, 62 Ala. 369; *Dorman v. Ames*, 12 Minn. 451; the last case citing the principal case to this point. There are, however, some expressions

of opinion to the contrary. Thus, in *Garrett v. McKie*, 1 Rich. L. 444; S. C., 44 Am. Dec. 263, it is laid down that the raising of water by a dam above its natural level, in the part of the channel of a stream owned by another riparian proprietor, does not give him a right of action, unless special damage be shown; and see *Williams v. Morland*, 2 Barn. & Cress. 910; *Wright v. Howard*, 1 Sim. & Stu. 190, 203. But the weight of authority is clearly to the contrary. If one's land is overflowed by another, the former, it seems, has a legal right to defend his land by erecting banks, dams, and the like, and if any consequences injurious to the first wrong-doer result from this course, he must submit to them, and can not recover compensation: *Merritt v. Parker*, Coxe, 460, 465.

FLOWING BACKWATER UPON MILL ABOVE.—The injunction, *Sic utere tuo, etc.*, applies equally to flowing backwater upon a mill above as to overflowing lands. "Indeed," as Mr. Angell says, "the consequences of setting back the water upon a mill-wheel above are, in most cases, more injurious than flowing the land in the absence of any mill upon it:" *Angell on Watercourses*, sec. 340. And in *Hodges v. Raymond*, 9 Mass. 316, 319, the supreme court of Massachusetts say: "There can be no difference whether the damage to the owner of a mill arise from the water above being diverted from his mill, or from the water below being stopped so as to flow back, and thereby prevent the mill from grinding. The mischief is the same, and the same remedy ought to be furnished:" so, too, in *Butz v. Ihrie*, 1 Rawle, 218, it was said that "any impediment in the stream, caused by the defendant's dam, by which the plaintiff's mill is stopped from grinding, in any state of the water, or made to grind slower or worse than it otherwise would, is an injury for which the plaintiff would be entitled to damages." Where the proprietor of a mill and a definite portion of the water power makes a change in a sluice-way, thereby occasioning an increase of backwater, to the injury of the mill of a neighboring owner, who is also a part owner of the water power, the latter may maintain an action therefor: *Munroe v. Gates*, 48 Me. 463. Under a decree for the lowering of a mill-dam to such an extent that it will not interfere with the plaintiff's prior enjoyment of a water power, the true height at which the dam ought to be allowed to stand should be determined rather by experiments than upon theoretical conclusions drawn from surveys: *Decorah Woolen Mill Co. v. Greer*, 58 Iowa, 86; and see *Brown v. Bush*, 45 Pa. St. 61.

FLOODING LANDS OR MILLS BELOW.—It is equally actionable for the owner of a dam to vehemently discharge a superabundance of water below him, injuring lands or mills, as it is to overflow or set back water above or to the side of him: *Angell on Watercourses*, sec. 335; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Gerrish v. Newmarket Mfg. Co.*, 30 N. H. 478; *Tillotson v. Smith*, 32 Id. 90; *Clinton v. Myers*, 46 N. Y. 511; an injunction, however, restraining an upper mill owner from allowing the water to flow over his dam in quantities greater than is required to run his machinery, but requiring him to allow it to flow into another's mill-pond, to the amount of the natural flow of the stream, is erroneous, because it discriminates in favor of the lower owner: *Hoorsie v. Hoorsie*, 38 Mich. 77.

DETENTION OF WATER.—The owner of a mill has likewise no right to detain water by means of a dam for an unreasonable time, to the injury of those below: *Merritt v. Brinkerhoff*, 17 Johns. 306; *Clinton v. Myers*, 46 N. Y. 511. But a reasonable detention for the purpose of driving such machinery as the stream in ordinary stages is capable of propelling is proper: *Clin-*

ton v. Myers, supra; Pitts v. Lancaster Mills, 13 Met. 156; Whaler v. Ahl, 29 Pa. St. 98; Bullard v. Saratoga Victoria Mfg. Co., 77 N. Y. 525. The reasonableness of the detention depends much upon the nature and size of the stream, as well as the employment to which it is subservient: Angell on Watercourses, sec. 119; *Davis v. Getchell, 50 Me. 602, 605; Tourtellot v. Phelps, 4 Gray, 370, 376; Norway Plains Co. v. Bradley, 52 N. H. 86, 105, 110; Timm v. Bear, 29 Wis. 254; Keeney etc. Mfg. Co. v. Union Mfg. Co., 39 Conn. 576; Parker v. Hotchkiss, 25 Id. 321.* In *Davis v. Getchell, supra*, Rice, J., uses the following language: "The reasonableness of the detention of running water by dams by a riparian proprietor above, to the injury of a riparian proprietor below, depends much upon the nature and size of the stream, as well as the use to which it is subservient. In small streams where the volume of water in its ordinary course would be insufficient for practical use, the law would authorize its detention for a reasonable time in which to accumulate a head which could be made available. It is only by thus accumulating water and then using it that many small streams can be made practically useful as a power for propelling mills and machinery. And, so far from this detention being confined to times necessary for repairs, or by reason of some extraordinary occurrence, it is the common and ordinary way in which the water power on such streams is made effective or valuable. The question in such case is whether the detention, under all the circumstances of the case, is an unreasonable use of the water, not whether it is unreasonably detained for the specific purpose of repair, or by reason of some extraordinary occurrence." Where it becomes necessary to clean out a pond the water may be drawn off, and the pond afterwards refilled; and if during the process of refilling a proprietor below is deprived of the use of the water for that time, he is without remedy for the damage: *De Baun v. Bran, 29 Hun, 236.* But a riparian proprietor to whom water first comes has not the right to erect dams across the stream and spread out the water so that it is lost by evaporation and absorption to an extent that prevents it from flowing to another riparian proprietor as it would have done but for the dams: *Ferreira v. Knipe, 28 Cal. 340.* The reasonableness of the detention, depending as it must on the stream, the business to which it is subservient, and the ever-varying circumstances of each particular case, must be determined by the jury: *Hetrich v. Deachler, 6 Pa. St. 32.*

RIGHT TO OVERFLOW OR SET BACK WATER AS ACQUIRED BY SPECIAL GRANT.—The right of the owner of a dam to overflow lands of another above or below, or to set back the water on an upper mill privilege, may be acquired by special grant, or reserved in a conveyance of the land, like any other easement: Angell on Watercourses, sec. 353; but of course the construction of all such conveyances and agreements will depend upon the express stipulations they contain, in connection with the nature of the right granted: *Id.*, sec. 361. Thus in the case of a conveyance of a mill and its appurtenances, and where the subject-matter of the conveyance and principal thing granted is the mill, the right to continue to overflow the lands of the grantor to the same extent as when the grant was made passes with the mill; but the rule is otherwise where the subject-matter of the grant is land upon which a mill is standing, the grantee not paying anything additional on account of the mill, or for the privilege of flooding other lands: *Wilcoxon v. McGhee, 12 Ill. 331; S. C., 54 Am. Dec. 409, 411;* and to the grant of a right to back the water on the land of the grantor, there is incident the right to enter and clean the pool and repair the dam: *Trailey v. Waters, 7 Pa. St. 221;* so, also, where the owner of lands agrees to allow the maintenance of a dam at

a certain height, the agreement includes as an incident the right of flowage caused by the maintenance of that height: *Albee v. Hayden*, 25 Minn. 267. A grant of land bounding on or near a pond and stream, reserving the mill and water privilege, is a reservation of the right of flowing the land, so far as necessary and convenient, or so far as has been usual to flow it for that purpose; and in such case the grantee takes subject to the easement: *Pellet v. Hailes*, 13 Pick. 323. But an exception of a mill site in a grant, operating as a reservation of the soil of the mill site and of the right of flowing so much land as is necessary for a mill-pond, is not a reservation of a mere easement, but of the soil itself; and the grantor and his assigns may enter upon and locate under the exception, even after the grantee has conveyed and assigned his interest to another: *Jackson v. Vermilyea*, 6 Cow. 678. The right to construct a dam on another's land implies the right to the exclusive use and possession of so much land as may be necessary for that purpose: *Cowell v. Brookhart*, 4 B. Mon. 580; S. C., 41 Am. Dec. 244. While it is competent for grantors to limit the right of flowage to particular purposes, a grant in fee simple, as a general rule, can not be restricted except by plain conditions: *Hathaway v. Mitchell*, 34 Mich. 164. So the owner of a mill under an agreement authorizing him to "keep his dam to the jury mark, and no higher," may vary, repair, and use his dam as he pleases, if he raises no part of the dam higher than that mark: *Short v. Woodward*, 13 Gray, 87. Mill owners, also, have the right to maintain their dams as they were at the time of the conveyances to them; and if through the want of repair for a series of years subsequent thereto the water escapes, the owners have the right to repair and tighten the dams, although the water is thereby raised higher and retained longer than it was while the dams were in a dilapidated condition: *Butler v. Huse*, 63 Me. 447; and where the owner of land through which a creek runs has diverted the water by means of a dam, so as to carry it to his mill, and afterwards sells part of the land below the point of diversion, he is entitled to the exclusive use of the water, and may repair his dam so as to allow none of it to escape, although at the time of the sale, the dam being old and defective, a small part of the water leaked through: *Frey v. Wilman*, 7 Pa. St. 440; S. C., 49 Am. Dec. 434. If a purchaser of a mill seat and water power accepts from the vendor a deed without any covenant for his protection as to the height of the dam or the extent of the flow, and the purchaser is subjected to an action for damage by reason of the improper height of the dam, he is without remedy either at law or in equity: *Hopper v. Lutkins*, 3 Green Ch. 149.

SCRIPTIVE RIGHT TO OVERFLOW OR RAISE WATER UPON UPPER MILL OWNER.—The right to flow lands or to raise water by means of a dam to the injury of an upper mill owner may, like easements in general, be acquired by an uninterrupted and adverse enjoyment for twenty years, or for the period of time, whatever it may be, limited by the statute of limitations for the right of entry upon land: Angell on Watercourses, sec. 372; *Cowell v. Thayer*, 5 Met. 253; S. C., 38 Am. Dec. 400; *Wilson v. Wilson*, 4 Dev. 154; *Norway Plains Co. v. Bradley*, 52 N. H. 86, 103; *Bucklin v. Truell*, 54 Id. 122; *Perley v. Hillon*, 55 Id. 444; *Sherwood v. Burr*, 4 Day, 244; *Brace v. Yale*, 10 Allen, 441; *Vail v. Mix*, 74 Ill. 127; *Lane v. Miller*, 27 Ind. 534; *Ogle v. Dill*, 55 Id. 130; and under the mill acts, where authority is conferred to flow land, on payment of damages, if a mill owner has kept up a dam and flowed the lands of another for twenty years, without such payment or question made, it is evidence of the right to maintain the dam and flow the lands, and a bar to a claim for damages: *Williams v. Nelson*, 23 Pick. 141; S. C., 34 Am. Dec.

43. The extent of the right acquired by adverse user is not determined by the height of the dam, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land was habitually flowed during the period of prescription: *Angell on Watercourses*, sec. 379; *Carlisle v. Cooper*, 21 N. J. Eq. 576, 594; *Mertz v. Dorney*, 25 Pa. St. 519; *Smith v. Russ*, 17 Wis. 227; *Powell v. Lash*, 64 N. C. 456; *Guildford v. Winnipiseogee Lake Co.*, 52 N. H. 262. In *Stiles v. Hooker*, 7 Cow. 266, it was held that where one has had the use of water at a given height for twenty years, a grant will be presumed of the privilege of using it at that height, but nothing more; and if the owner repairs his dam, which has kept the water at that height, so as to raise the water still higher, and flow it back upon his neighbor's mill, an action lies though the dam itself remain at its ancient height; the question is not upon the height of the dam, but of the water; and see *Russell v. Scott*, 9 Cow. 279; *Baldwin v. Calkins*, 10 Wend. 169. But a mill owner who has acquired a prescriptive right to keep up a dam constantly, which in its usual operation would raise the water to a certain height, although from the leaky condition of the dam, the rude construction of the machinery in the mill, or other cause the water has not been usually and constantly kept up to such height, may repair the dam or erect a new one, if he does not thereby raise the water higher than the old dam in its efficient state, or may use the water in a different manner, and thereby keep it up more constantly than before; this is not a new use for which damages can be claimed, but a use conformable to the mill owner's prescriptive right: *Angell on Watercourses*, sec. 380; *Cowell v. Thayer*, 5 Met. 253; S. C., 38 Am. Dec. 400; *Whittier v. Cochecho Mfg. Co.*, 9 N. H. 454; S. C., 32 Am. Dec. 382; *Jackson v. Harrington*, 2 Allen, 242; *Ray v. Fletcher*, 12 Cush. 200; *Brace v. Yale*, 99 Mass. 488, 492; *Powers v. Osgood*, 102 Id. 454, 457; *Hynds v. Shultz*, 39 Barb. 600; *Marclay v. Shultz*, 29 N. Y. 346; *Lacy v. Arnett*, 33 Pa. St. 169; *Carlisle v. Cooper*, 21 N. J. Eq. 576, 595; *Voter v. Hobbs*, 69 Me. 19; *Alder v. Savill*, 5 Taunt. 454; and see *Baker v. Maguire*, 53 Ga. 245; *Maguire v. Baker*, 57 Id. 109. The observations of Shaw, C. J., in *Ray v. Fletcher*, *supra*, are worthy of notice in this regard; he says: "It is not the actual height of the dam which will regulate the prescriptive right of a party holding it, but its efficient height, according to its structure and operation, to maintain the height of the water, when in repair and good order, and although the water actually raised by it may to some extent vary from one season, or one year, to another, owing to the tightness of the dam, the mode of using the water, the different seasons, as being dry or wet, and the like, yet these considerations are too variable and uncertain to be adopted or relied on as the basis of a right acquired by grant or prescription." A prescriptive right to overflow lands, or to interfere with an upper mill owner by setting water back, may be lost by non-user for the length of time required to gain it: *Angell on Watercourses*, sec. 385; *French v. Braintree Mfg. Co.*, 23 Pick. 216; but the abandonment of a prescriptive right to maintain a dam and flood lands is not presumed from a non-user for a less period: *Williams v. Nelson*, Id. 141; S. C., 34 Am. Dec. 45. A distinction, however, may be here noticed between easements to overflow acquired by prescription and those acquired by express grant, it being held in the latter case that there must not only be disuse, but actual adverse user, to extinguish the right; while in the former case mere disuse is sufficient: *Angell on Watercourses*, sec. 385; *Mower v. Hutchinson*, 9 Vt. 242; *Smith v. Modus Water Co.*, 35 Conn. 392; but see *Pillsbury v. Moore*, 44 Me. 154. But the right to flow, whether acquired by prescription or express grant, may be extinguished by abandonment for a less period than twenty years, if the abandonment is accompanied

by an intention to surrender, and this intention is acted upon by the owner of the lands subject to be flowed: Angell on Watercourses, sec. 385; *French v. Braintree Mfg. Co.*, 23 Pick. 216.

PAROL LICENSE TO OVERFLOW OR BACK WATER.—Whether one person can acquire an interest in or over the land of another through a parol license, the cases are not agreed. In reference to parol licenses giving a right to overflow, Mr. Angell says: "The right of flowing land, or of making back-water, is an incorporeal hereditament, and therefore can only be created by deed or by prescription, which supposes one. The utmost effect which a parol license to flow land has is to protect the person acting by the authority of it against an action for damages until it is revoked by the licensor. A licensee may give evidence of the license, and thus defeat a claim for damages by the licensor, sustained while the license remains unrevoked. To allow a parol license to convey any permanent interest in land, or one which can be assigned by the licensee, or descend to his heirs, would be directly contrary to the statute of frauds:" Angell on Watercourses, sec. 387; again he says: "But a court of equity, as we have seen, though it does not hold that a right in land passes by a parol license, will hold that, whenever one party has executed it by taking possession and expending money, the other party is bound to carry it into execution:" Id. The nature of licenses and their revocability have already been considered in the notes to *Ricker v. Kelly*, 10 Am. Dec. 38, and *Rerick v. Kern*, 16 Id. 497, and it will be unnecessary to treat of the question here. See also the following cases on the erection of dams upon and the flowing of another's land, under parol license: *Woodbury v. Parshley*, 28 Id. 739; *McKellip v. McIlhenny*, 28 Id. 711; *Johnson v. Lewis*, 33 Id. 405; *Seidensparger v. Spear*, 35 Id. 234; *Wilson v. Chalfant*, 45 Id. 574; *Stevens v. Stevens*, Id. 203; *Woodward v. Seely*, 50 Id. 445; *Hazelton v. Putnam*, 54 Id. 158, and the note thereto.

FLOWING LANDS UNDER MILL ACTS.—Under the so-called "mill acts," passed by the legislatures of many states in the exercise of the power of eminent domain, dams may be erected and the lands of another flooded, or condemned for that purpose, upon payment of damages as therein provided. Certain of these statutes have, however, been declared unconstitutional: *Tyler v. Beacher*, 44 Vt. 648; S. C., 8 Am. Rep. 398; *Ryerson v. Brown*, 35 Mich. 333; *Loughbridge v. Harris*, 42 Ga. 500. The acts usually provide expressly that no dam shall be erected to the injury of any mill already existing; but independent of this, it is held that where the proprietor of land through which a stream flows has actually built or is building a mill thereon, a proprietor of land below can not, without a right acquired by grant, prescription, or actual use, erect a new dam or raise an old one, so as to destroy the upper mill privilege, simply under a liability to pay damages pursuant to the acts, nor do the acts apply to such a case: *Bigelow v. Newell*, 10 Pick. 348; and see *Cary v. Daniels*, 8 Met. 466; S. C., 41 Am. Dec. 532. The right, however, acquired by a mill owner under the mill acts is not so absolute as to give him the control of the whole stream. Other proprietors may still construct and maintain dams across the stream at any point, either above or below, for the purpose of raising a head of water to work mills of their own, provided that they do not unreasonably detain or throw back the water: *Smith v. Agawam Canal Co.*, 2 Allen, 355; *Thurber v. Martin*, 2 Gray, 394. But it is not within the scope of this note to enter into a discussion of these statutes.

CARE AND SKILL REQUIRED IN CONSTRUCTING AND MAINTAINING DAMS.—The rule is perfectly well settled that the owner of a dam must use reason-

able care and skill in so constructing and maintaining it that it will not be the means of injuring another, either above or below, by throwing the water back, or being incapable of resisting it in times of usual, ordinary, and expected floods; but his liability extends no further, and he is not held responsible for inevitable accidents, or for injuries occasioned by extraordinary freshets which could not be anticipated or guarded against: Washb. on Easements, pp. *288, *289; Angell on Watercourses, sec. 336; *Lapham v. Curtis*, 26 Am. Dec. 310; *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.*, Id. 111; *Bell v. McClintock*, 34 Id. 507; *Monogahela Nav. Co. v. Coon*, 47 Id. 474; *Lacy v. Arnett*, 33 Pa. St. 169; *Casebeer v. Mowry*, 55 Id. 419; *Knoll v. Light*, 76 Id. 268; *Mayor etc. of New York v. Bailey*, 2 Denio, 433; *Inhabitants of China v. Southwick*, 12 Me. 238; *Inhabitants of Shrewsbury v. Smith*, 12 Cush. 177; *Inhabitants of Wendell v. Pratt*, 12 Allen, 464; *Smith v. Agawam Canal Co.*, 2 Id. 355; *Gray v. Harris*, 107 Mass. 492; S. C., 9 Am. Rep. 61; *Hoffman v. Tuolumne Co. Water Co.*, 10 Cal. 413; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Id. 225; *Proctor v. Jennings*, 6 Nev. 83. *Ames v. Cannon River Man. Co.*, 27 Minn. 245; *Dorman v. Ames*, 12 Id. 451, 464; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236, 243; the last two cases citing and approving the principal case on this point; and a complaint charging that the defendant so negligently and defectively constructed and superintended certain of his dams that they were unable to resist the pressure of the water and were carried out, thus flooding the stream below, and that such water was discharged through the gates of the dams upon the lands of the plaintiff, causing damage, shows an injury for which a common-law action may be maintained, and for which the mill-dam act of Wisconsin affords no remedy: *Rich v. Keshena Improvement Co.*, 56 Wis. 287. In *Lapham v. Curtis*, *supra*, Baylies, J., uses the following language: "But the defendant [the owner of the dam] was subject to the maxim, *Sic utere tuo ut alienum non laedas*. To comply with this requisition of the common law, it was the duty of the defendant to have used ordinary care and diligence in making repairs to his dam, or in drawing off the water from his pond, to prevent injuries to the plaintiffs' furnace. If the defendant did not use this care and diligence, he was guilty of negligence, and liable for consequential damages; but he was not liable for inevitable accidents." In the case of *Inhabitants of China v. Southwick*, *supra*, the owner of a dam was held not to be responsible for the destruction of a bridge caused by the waters being thrown upon it by great rains and a violent wind, although if the dam had not raised the water to a certain height, the rains and wind superadded might not have done the injury, Weston, C. J., saying: "If the dam had not raised the water to a certain height, the wind or the rain superadded might not have done the damage. It may have been one then of a series of causes to which the injury may have been indirectly ascribed. Their connection, however, was fortuitous, and resulted from an extraordinary and unusual state of things. Neither the rain nor the wind was caused by the dam. The bridge had continued unimpaired for a series of years, while the dam was higher than it was when the bridge was carried away. Such an event could not therefore have been reasonably calculated or foreseen. It would be carrying the doctrine of liability to a most unreasonable length to run up a succession of causes, and hold each responsible for what followed, especially where the connection was casual and unexpected, as it was here, and where that which is attempted to be charged was in itself innocent. The law gives no encouragement to speculations of this sort. It rejects them at once. Hence the legal maxim, *Causa propinqua non remota spectatur*."

Mr. Chief Justice Ruffin, in *Pugh v. Wheeler*, 2 Dev. & B. 50, lays down the following broad doctrine: "It has not been denied here that a party can not obstruct a stream below, so as to prevent the water from escaping as it naturally would, and thereby pour it back upon the land of another, simply because those consequences do not exist at all times ordinarily, but only when the stream is swollen. We think it clear that circumstance can only effect the quantum of damage, and does not excuse the party altogether. One has the right at no time to prevent the water from flowing the land of a proprietor above, as it has usually done, more than the proprietor above has the right to divert the stream, so as to prevent it from flowing below." The learned chief justice here does not seem to make any distinction between freshets ordinarily and periodically occurring and extraordinary floods which can not be reasonably anticipated against, and in thus far his observations do not accord with the weight of authority. The owner of a dam is bound to see to his own property, and to so govern and control it that injury will not result to his neighbors; and the want of reasonable care on the part of another who is injured by the breaking can not be set up in defense to an action for damages for the injuries suffered: *Frater v. Sears Union Water Co.*, 12 Cal. 555; and a mill owner who partially obstructs the flow of water in a stream from his own mill is not thereby prevented from maintaining an action against another mill owner lower down the same stream for an additional obstruction, in consequence of the latter maintaining his dam at too great a height, whereby the water is set back; the doctrine of contributory negligence does not apply: *Brown v. Dean*, 123 Mass. 254; *Clarke v. French*, 122 Id. 419.

RIGHT OF OWNER OF DAM TO TAKE ICE FROM OR FLOAT LOGS IN POND. It has been held, on the one side, that a mill owner who has the right to erect a dam and flow the lands of another for mill purposes does not own the ice which forms in the water over the lands of such person, and the latter may remove and take the ice unless he thereby injures the mill owner: *Dodge v. Berry*, 26 Hun, 246; *Marshall v. Peters*, 12 How. Pr. 217; *Cummings v. Barrett*, 10 Cush. 186; *State v. Pottmyer*, 33 Ind. 402. These decisions are placed on two different grounds, viz.: the general doctrine that the owner of land through which a stream runs has a right to its just and reasonable use, and this right attaches to the water in a congealed state; and next, that water when frozen constitutes a part of the realty, and belongs to the owner of the soil. Other cases maintain the right of an owner of a dam and mill-pond to take the ice therefrom: See *Myer v. Whitaker*, 5 Abb. N. C. 172; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 482. That the right to use a pond for a mill-pond includes the right to float logs thereon for the use of the mill is held by *Beals v. Stewart*, 6 Lans. 408.

DAMS IN NAVIGABLE STREAMS.—A dam erected in a navigable stream, if not sanctioned by any statute, is indictable as a public nuisance: *Angell on Watercourses*, sec. 562; *Gould on Waters*, sec. 134; *Rex v. Ward*, 4 Ad. & El. 384; *Commonwealth v. Church*, 1 Pa. St. 105; S. C., 44 Am. Dec. 112; *Gates v. Blincoe*, 2 Dana, 158; *Yolo Co. v. City of Sacramento*, 36 Cal. 193, 196. And while a dam in navigable waters, if authorized by an act of the legislature, can not be indicted as a public nuisance for obstructing the stream, still the act is no protection against injuries caused to a private owner: *Crittenden v. Wilson*, 5 Cow. 165; *Lee v. Pembroke Iron Co.*, 57 Me. 481; S. C., 2 Am. Rep. 59; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 160; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Angell on Watercourses*, sec. 476; but that the plaintiff's dam obstructs navigation is no defense to an action.

for obstructing the flow of water to his mill: *Haller v. Pine*, 8 Blackf. 175; S. C., 44 Am. Dec. 762; and see *Luning v. State*, 2 Pinn. 215; S. C., 52 Am. Dec. 153, as to the protection afforded by the mill acts against a public nuisance created by a dam across unnavigable streams. In *Parker v. Cutler Mill-dam Co.*, 20 Me. 353; S. C., 37 Am. Dec. 56, it was held that where a dam was erected across navigable waters by a corporation under an act of the legislature, the corporation was not liable to a riparian owner below for damages occasioned by altering the flux and reflux of the tide. If a dam be built in a navigable stream in conformity with the provisions of the law, and the shoot has been rendered unnavigable by flood or accident, the owner of the dam would not be liable for damage occasioned thereby before he had time to repair it; nor in an action for a nuisance would he be liable for an erroneous opinion as to the safety of running through the shoot in its damaged condition: *Roush v. Walter*, 10 Watts, 86.

Where the proprietor of a stream, which the public have a right to use for running logs obstructs it by a dam and logs, a person whose logs are thereby prevented from passing down the stream may repair sluices running through such proprietor's lands for the purpose of getting his logs by the dam, and may recover from the proprietor the amount necessarily expended in so doing: *Brown v. Chadbourne*, 31 Me. 9; S. C., 50 Am. Dec. 641. It is held that every legislative grant of a right to maintain a dam across a stream where fish are accustomed to pass is subject to the condition that a sufficient way shall be allowed for the fish, unless by express provision or obvious implication in the grant, the maintenance of a fishway is dispensed with: *Commissioners v. Holyoke Water Power Co.*, 104 Mass. 446; S. C., 6 Am. Rep. 247; and see *Inhabitants of Stoughton v. Baker*, 4 Mass. 522; S. C., 3 Am. Dec. 236; so, also, the maintenance of dams without fishways in an unnavigable river, which is the outlet of a large inland lake, thereby obstructing the passage of migratory fish from the sea to the lake, constitutes an indictable nuisance at common law: *State v. Franklin Falls Co.*, 49 N. H. 240; S. C., 6 Am. Rep. 513; but, on the other hand, it is held in *People v. Platt*, 17 Johns. 195; S. C., 8 Am. Dec. 382, that the erection of a dam near the mouth of such a river by the patentee of lands through which it flows, by which salmon are prevented from passing up the river from such a lake, is not indictable, either at common law or under statutes providing for the construction or alteration of dams in a certain manner so as to allow salmon to pass up over into the waters above the dam.

OWENS v. MYERS.

[20 PENNSYLVANIA STATE, 134.]

ADVERSE POSSESSION IS NOT MADE LESS HOSTILE TO TRUE TITLE, nor is a title already complete under the statute of limitations divested, by the mere purchase of an outstanding invalid claim to the land.

ADVERSE CLAIMANT'S PRESENCE AND SILENCE AT SHERIFF'S SALE DO NOT AMOUNT TO ESTOPPEL from asserting his title to the land, if the purchaser knew of the claim.

EJECTMENT by Myers, the plaintiff below, against John Owens, David Owens, and David Keener, to recover a tract of land. It

appeared that one Thomas Owens had entered upon the land in dispute in 1803, and had held it adversely to the true owners, Shoemaker and Willis, until his death in 1833; after which time his children continued to occupy it, and in 1839 one of them, the defendant, John Owens, obtained a deed from Shoemaker and Willis, through an attorney in fact. Myers claimed under a deed obtained from the same person in 1834, but not recorded until after that of the one first mentioned. It also appeared that in 1844, the interest of the children, Peter, Thomas, and John Owens, was sold at sheriff's sale to the defendant, David Owens, and that Myers was present at the sale, but did not object or give notice of his claim. The jury were instructed that the defendant, John Owens, "had an improvement right, and in fact, from the evidence, might have held under the statute of limitations, if he had not thought proper to acknowledge the title of Shoemaker and Willis;" and that "the plaintiff and defendant, having purchased from the attorney in fact of Shoemaker and Willis, must entirely rest on these titles, and can not go into the improvement title, for the purpose of modifying or establishing their rights here." The jury were also instructed that the presence and silence of Myers at the sheriff's sale would not amount to an estoppel, under the circumstances proved, particularly if David Owens knew of Myers' claim. These charges were assigned for error.

Black, for the plaintiffs in error.

Montgomery and Sayers, for the defendant in error.

By Court, LOWRIE, J. There seems to have been evidence that Owens had held this land, or a part of it, and perhaps adversely to the true owner, from 1803 up to 1839, and that then he got a deed from the original owner, who had in 1834 sold the land to Myers. It is on such a state of the evidence, in an action by Myers against Owens for the land, that the court instructs the jury that Owens might have claimed the land by the statute of limitations if he had not acknowledged the original title by purchasing it; and that, on account of this recognition, he must rely solely upon his purchase.

We are not able to understand otherwise the charge of the court; and surely this is wrong. If he had a good title in any way, and then bought a bad one, by what logic can this work a forfeiture of the good one? The fact of his purchase may be evidence that until then he had no valid title; but it does not prevent him from showing and relying upon the contrary.

Even if his adverse possession had not perfected his title when he bought the Shoemaker title, does that purchase under the circumstances prevent it from ever becoming perfect? Suppose it is an acknowledgment of the Shoemaker title; it acknowledged no more than it was worth getting; and as to it there can be no question of adverse possession, for he has it by deed.

But admit the acknowledgment. It was a mistake; for the title was not Shoemaker's, but Myers', if it was not Owens'. Myers was not a privy to the transaction, and can claim no right under it. It did him no harm, and he can claim from it no advantage. Even if the statute of limitations had not run out at the time of the purchase, that fact did not stop it from running as to Myers, being itself an act of hostility to him. The result is, that the mere purchase of an outstanding invalid claim to land does not make an adverse possession less hostile to the true title, nor divest a title already complete under the statute of limitations.

The other parts of the case are without error.

Judgment reversed and a new trial awarded.

PURCHASE OF OUTSTANDING TITLE BY ONE IN ADVERSE POSSESSION.—The principal case was followed in *Bannon v. Brandon*, 34 Pa. St. 289, where it was held that an attempt to purchase a better title did not affect an inchoate right previously acquired under the statute of limitations; it did not render possession less hostile to the true title. But an acknowledgment of the owner's title by an adverse possessor of land interrupts the running of the statute of limitations: *Ingersoll v. Lewis*, 51 Am. Dec. 536; and see the cases in the note thereto. As to the effect of receiving a deed from the true owner, of part of a tract of land, on the adverse holding of one who went into possession of the whole under a deed from one having no title, see *Schwarts v. Kuhn*, 25 Id. 239.

OWNER OF LAND ESTOPPED BY ACQUIESCEENCE FROM SETTING UP TITLE THERETO: *Godefroy v. Caldwell*, 58 Am. Dec. 360; *Danley v. Rector*, 50 Id. 242; and notes collecting prior cases.

PRINCIPAL CASE WAS ALSO CITED in *Ross v. Baker*, 72 Pa. St. 191, to the point that a sheriff's vendee takes no title if he was connusant of an earlier outstanding equitable title, or had such information or notice as to put him on inquiry which would lead to a knowledge of the fact by the exercise of ordinary diligence and understanding.

MORRISON v. DAVIS.

[20 PENNSYLVANIA STATE, 171.]

COMMON CARRIERS ARE NOT RESPONSIBLE FOR REMOTE AND EXTRAORDINARY CONSEQUENCES of their negligence, but for those that are ordinary and proximate.

EXCEPTION AS TO INEVITABLE ACCIDENTS IS IMPLIED BY LAW IN COMMON CARRIER'S FAVOR, when not expressed in the bill of lading, or other such contract; but this exemption will not be implied where the circumstances show that it should not be.

PAROL EVIDENCE IS ADMISSIBLE TO REPEL IMPLICATION IN COMMON CARRIER'S FAVOR AGAINST INEVITABLE ACCIDENTS, and to show that he has agreed to insure the safe delivery of the goods, where he has simply undertaken by the bill of lading to deliver them.

OWNER OF GOODS NEED NOT PROVE COMMON CARRIER'S ADVERTISEMENTS OR BUSINESS TERMS CAME TO HIS KNOWLEDGE before delivering his goods to the carrier for transportation: it is proper to presume that customers have been induced by the advertisements, or that they have been repeated to them, where favorable terms of business are advertised as a means of gaining customers.

ASSUMPTION against the defendants to recover damages for loss of merchandise shipped from Philadelphia to Pittsburgh. The declaration contained five counts, of which the first two charged the defendants as common carriers; the third averred that the defendants "undertook and faithfully promised the said plaintiffs to guaranty the safe delivery of the said goods, wares, merchandise, and chattels for the said plaintiffs at Pittsburgh, in the county aforesaid, without exception;" the fourth charged that they "undertook and faithfully promised the said plaintiffs to insure the safe delivery of the said goods, wares, merchandise, and chattels for the said plaintiffs;" and the fifth that they "undertook and faithfully promised the said plaintiffs to insure the said last-mentioned goods, wares, merchandise, and chattels, and to be and become the insurers thereof from the city of Philadelphia aforesaid to the city of Pittsburgh, in the county aforesaid; and in case of the loss of the said goods, wares, merchandise, and chattels, or any part thereof, or of damage or injury to the same, or of any part thereof, during the carriage, transportation, and conveyance and delivery thereof, by the said defendants, to be responsible therefor to the said plaintiff, and liable for the value thereof." To this declaration the defendants pleaded *non assumpsit*. The substance of the bill of lading put in evidence by the plaintiff was as follows: "Received and collected the following packages, in apparent good order, marked as per margin, which we promise to deliver in like order to John McFadden & Co., on presenting this receipt and payment of freight, at our warehouse in Pittsburgh, within eight days (Sundays excepted), unless unavoidably detained, of which affidavit of captain shall be evidence." Other facts of the case, and the questions which arose, will be found in the opinion.

Williams and Shinn, for the plaintiff in error.

Shaler and Stanton, for the defendants.

By Court, LOWRIE, J. This is an action of *assumpsit*, and the declaration contains several counts, the two first charging the defendants as common carriers, and the others charging them on a special contract, substantially amounting to an agreement to carry safely and to insure them against all risks.

On the first two counts the evidence offered was admitted, and it appeared, among other things, that the defendants' canal boat, in which the goods were carried, was wrecked below Piper's dam, by reason of the extraordinary flood in the Juniata division of the Pennsylvania canal in the fall of 1847; and further, that the boat started on its voyage with one lame horse, and that by reason thereof great delay was occasioned in making the voyage, and that had it not been for this the boat would have passed the point where the accident occurred before the flood came, and would have arrived safely and in time.

The plaintiff insisted that inasmuch as the negligence of the defendants in using a lame horse for the voyage occasioned the loss, therefore they were liable. But the court refused so to instruct the jury, and this is one of the principal assignments of error.

In answering this question we must assume that the proximate cause of the disaster was the flood, and the fault of having a lame horse was a remote one, which, by concurring with the extraordinary flood, became fatal. We assume that the immediate cause had the character of an inevitable accident; but that this cause could not have affected the boat had it not been for the remote fault of starting with a lame horse. The question then is, Does the law treat this fault and its consequent delay as an element in testing the inevitableness of the disaster at Piper's dam? We think it does not.

In any other than a carrier case, the question would present no difficulty. The general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast; and not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature.

Thus, a blacksmith pricks a horse by careless shoeing: ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use; but it could not anticipate that by

reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider; and such injury would be no proper measure of the blacksmith's liability. The true measure is indicated by the maxim, *Causa proxima, non remota spectatur.*

It is on the same principle that insurers against the perils of the sea are not liable for a loss immediately arising from another cause, though by the perils of the sea the ship had sustained an injury without which the loss would not have taken place: *Livie v. Janson*, 12 East, 648; *Hahn v. Corbett*, 2 Bing. 205; *Rice v. Homer*, 12 Mass. 230. And on the other hand, the insurers are liable in case of a loss by the perils insured against, though the loss would not have happened had it not been for remote negligence by the master or crew: *Williams v. Suffolk Ins. Co.*, 3 Sumn. 270; *Redman v. Wilson*, 14 Mee. & W. 476; *Sadler v. Dixon*, 8 Id. 895; *Waters v. Merchants' etc. Ins. Co.*, 11 Pet. 213; *Walker v. Maitland*, 5 Barn. & Ald. 171; *Hare v. Travis*, 7 Barn. & Cress. 14; *Heyman v. Parish*, 2 Camp. 149.

The case of a deviation is no exception to this rule; for there the insurer is not liable because that act makes a different voyage from the one insured.

There are often very small faults which are the occasion of the most serious and distressing consequences. Thus, a momentary act of carelessness set fire to a little straw, and that set fire to a house, and, by an extraordinary concurrence of very dry weather and high winds, with this fault, one third of a city (Pittsburgh) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed? On the other hand, these very small acts are often the cause of incalculable blessings. A bucket of water, promptly applied, would have saved all that loss; but the amount saved would have been no proper measure of reward for such an act. There are thousands of acts of the most beneficial consequence that receive and deserve very little reward, because in themselves and in their purpose they have very little merit.

Now there is nothing in the policy of the law relating to common carriers that calls for any different rule as to consequential damages to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary; and this liability includes all those consequences which may have arisen from the neglect to make provision for those dangers which

ordinary skill and foresight is bound to anticipate. Though they are held to the strictest care, as to the sufficiency of their ship and other vehicles, and the custody of the goods, yet no greater foresight of extraordinary perils is expected from them than of other men; and no greater penalty is visited for its failure. The consequence which ordinary foresight may anticipate from an insufficient ship is that all the goods may be lost; their value is, therefore, the proper measure of the damage. But the ordinary consequence of the fault charged in this case is the loss of time, and the penalty is measured accordingly, even though a concurrence of other extraordinary circumstances has greatly increased the extent of the loss. The law does not make this delay an element in testing the inevitableness of the final disaster: *Parsons v. Hardy*, 14 Wend. 215 [28 Am. Dec. 521].

We may here say a word as to the care required of carriers when they discover themselves in peril by inevitable accident.

In such a case, the law requires of them ordinary care, skill, and foresight. This is different in different countries, depending upon the degree of civilization, and in different circumstances depending upon the degree of peril. It is commonly defined as the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. It increases as difficulties increase. In great danger, great care is the ordinary care of prudent men. Such was the substance of the instruction given on this point by the court below, and it is right. So far, therefore, as relates to the first and second counts, there is no error, and the judgment as to them must be affirmed.

We come now to the question of evidence. The plaintiff, in support of the third, fourth, and fifth counts, offered to prove by oral testimony, connected with advertisements and circulars of the defendants, that the defendants agreed to insure the safe delivery of the goods, without any exception for inevitable accidents; and this offer was rejected by the court, as tending to contradict the written contract.

These counts are somewhat strange; but they have not been objected to, and perhaps they sufficiently lay a contract to carry and to insure a safe delivery. It is impossible to make two contracts out of one, by ingenuity in declaring. If the reward was the consideration for carrying and insuring, a different contract is not made by charging or proving that the reward and delivery of the goods to be carried was the consideration for insuring. Both are substantially the same.

Let it be noticed, that by the bill of lading the defendants have undertaken to deliver the goods, and that they have not inserted in it the usual exception clause as to inevitable accidents. But still the exception is, *prima facie* at least, implied by law in all such contracts. The question then is not, May parol evidence be received to contradict the written agreement? but, May it be received to repel an implication of a condition usually raised by the law in such cases, and which is itself, in this instance, contrary to the words as written?

A written contract creates a specified relation between the parties; and when the duties of that relation are not fully defined in the contract, the law defines them according to the circumstances. In a carrier case, it defines the duty, in part, by implying the exception against inevitable accident. But here the maxim applies, *Conventio vincit legem*. The law does not imply the exemption, where the circumstances show that the parties intended that it should not be implied; and these circumstances may be shown by parol evidence.

This is the very principle decided in the case of *Barclay v. Weaver*, 19 Pa. St. 396 [*ante*, p. 661], argued about the same time with this; and it was there applied in the same way when it was decided that parol evidence may be given to show that an indorser of a promissory note agreed to be liable without the usual demand and notice required by law. The court was therefore in error in rejecting this evidence on such grounds: See also Abb. on Ship. 130; Id. 320; Angell on Carr., sec. 222.

But the whole evidence proposed to be given is set out in the bill of exceptions; and it is argued that, if admitted, it is insufficient to prove the allegation, because the circulars contain an offer to carry and insure at one price, and these goods are contracted to be delivered at another and less price; and this argument would prevail if the circulars were the only evidence. But they are not. There were oral testimony and advertisements besides; and we can not say that, from all taken together, the inference of an agreement to insure would be illegitimate.

Where a man advertises favorable terms of business as a means of gaining customers, it is proper to presume that his customers have been induced by them, or that they have been repeated to them; and therefore it is not necessary that the plaintiff should prove that the advertisements came to his knowledge before delivering his goods to the defendants to be carried. The judgment as to these counts must be reversed.

Judgment affirmed as to first and second counts; and as to

the third, fourth, and fifth counts, it is reversed, and a new trial therein awarded.

COMMON CARRIERS ARE INSURERS OF GOODS against all but act of God and public enemy, in the absence of any qualification of their liability: *Neal v. Saunderson*, 41 Am. Dec. 609, and note collecting prior cases; *Whitesides v. Thurlkill*, 51 Id. 128; *Leonard v. Hendrickson*, 55 Id. 587. As to what is an act of God, see *Williams v. Grant*, 7 Id. 235; *Plaisted v. Boston etc. Nav. Co.*, 46 Id. 587; *Friend v. Woods*, 52 Id. 119. "Act of God," "unavoidable," and "inevitable" are convertible terms; *Van Hern v. Taylor*, 41 Id. 281; *Reeves v. Waterman*, 42 Id. 364; *Fish v. Chapman*, 46 Id. 393, and notes to these cases, referring to other cases, and considering the subject. The principal case was cited in *Hays v. Kennedy*, 41 Pa. St. 380, as an instance where the term "unavoidable accident" is used as exactly equivalent to "act of God, or of the public enemies." As to the power of common carriers to limit their liability, see *Hale v. New Jersey Steam Nav. Co.* 39 Am. Dec. 398, and note; *Fish v. Chapman*, 46 Id. 393; *Farmers' etc. Bank v. Champlain T. Co.*, 58 Id. 68, and note.

COMMON CARRIERS WHETHER LIABLE FOR REMOTE AND EXTRAORDINARY CONSEQUENCES OF NEGLIGENCE.—The principal case has been frequently approved and followed on the proposition that where a common carrier has been negligent, for example, has been guilty of delay in forwarding goods, and a loss or damage afterwards occurs through inevitable accident, he is not responsible, although if it had not been for his negligence the accident would have been avoided: *Denny v. New York Central R. R.* 13 Gray, 486; *Michigan Cent. R. R. v. Burrows*, 33 Mich. 15; *Railroad Co. v. Reeves*, 10 Wall. 190; *Hoadley v. Northern Transportation Co.*, 115 Mass. 308; and see *Caldwell v. Southern Express Co.*, 1 Flipp. 88. In *Jones v. Gilmore*, 91 Pa. St. 314, the principal case was cited as applying a summary of the rule and principle that a wrong-doer shall be held responsible for the proximate, and not the remote, consequences of his acts to common carriers, with the remark that in any other case the question would present no difficulty; and the remarks of Merrick, J., in *Denny v. New York Cent. R. R.*, *supra*, "In that case may be found not only a clear and satisfactory statement of the law upon the subject, but a significant illustration of the rule which the decision recognizes and affirms," concerning it were quoted. And see further on this question *Collier v. Valentine*, 49 Am. Dec. 81.

EXCEPTION AS TO INEVITABLE ACCIDENTS IS IMPLIED IN COMMON CARRIER'S FAVOR, when not expressed in the bill of lading: *Neal v. Saunderson*, 41 Am. Dec. 609, 612.

PAROL EVIDENCE, HOW FAR ADMISSIBLE TO CONTROL BILL OF LADING AS TO TERMS OF CONTRACT OF CARRIAGE.—This question is discussed in the note to *Chandler v. Sprague*, 38 Am. Dec. 409; see also *Wayland's Adm'r v. Mosely*, 39 Id. 335; *O'Brien v. Gilchrist*, 56 Id. 676; and *Gage v. Tirrell*, 9 Allen, 304, where the principal case was cited to the point that a bill of lading does not constitute the evidence of a contract of affreightment when there is a previously existing contract for the carriage of goods.

PROXIMATE AND REMOTE CAUSES OF NEGLIGENCE, IN GENERAL, LIABILITY FOR.—As to how far railroad corporations are liable for the consequences of their negligence in setting fire to buildings, and other property, see the note to *Burroughs v. Housatonic R. R.*, 38 Am. Dec. 77; and as to how far insurers are liable, see the cases in this series collected in the note to *Nelson v.*

Suffolk Ins. Co., 54 Id. 787. The principal case was approved in *Scott v. Hunter*, 46 Pa. St. 195, on the question of liability for proximate and remote causes of negligence, but distinguished in a case where the defendants' act was concurrent in time and operation with a flood in a stream causing the loss of boats. These two cases were commented upon in *McGrew v. Stone*, 53 Id. 443, the court saying that the maxim, *Causa proxima*, etc., had its proper application in the principal case, and that the reason for the different rulings appeared to be that in *Scott v. Hunter* the defendants' act was directly connected with the condition of the stream; the cases were further said to be ruled by the principle (p. 442) that one is answerable for the consequences of a fault which are natural and probable, and might therefore be foreseen by ordinary forecast, while it is true that if the fault happened to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for the unexpected result. The principal case was also quoted in *Pennsylvania R. R. v. Kerr*, 62 Id. 367, in support of the proposition that where a railroad engine set fire to a building, and the fire therefrom communicated to another building at some distance from it, the railroad company was not liable for the destruction of the latter building; and in *McDonald v. Snelling*, 14 Allen, 298, it was referred to in holding that one, whose servant so negligently drives in a public street as to collide with a carriage, and thereby cause the horse drawing the same to take fright and run away, may be held liable to one who is injured by the runaway horse; but in *Rauch v. Lloyd*, 31 Pa. St. 369, the court expressed its inability to see how the doctrine of the principal case could be adjusted without undue wrenching to an instance where the conductor of a train permitted it to stand on the crossing of a public street, and absented himself from it, and a teamster attached his horses to it, starting the train and causing an injury; Woodward, J., added that the principal case should be read in connection with *Pittsburgh v. Grier*, 22 Id. 65, where Black, C. J., stated that the application of the maxim, *Causa proxima*, etc., is often very difficult, no exact rule being given to determine what is a remote and what a proximate cause, and saying that "in *Morrison v. Davis* the lameness of the horse was so palpably not the cause of disaster, and the breaking of the dam by which the boat was swept away was so clearly the true, and in legal contemplation the only, cause, that the question there was very simple."

THE PRINCIPAL CASE IS ALSO CITED in *Musselman v. Stoner*, 31 Pa. St. 270, to the point that parol evidence is admissible to rebut a presumption; and in *Huyett v. Philadelphia etc. R. R.*, 23 Id. 374, to the point that railroads are bound to temper their care according to the circumstances of danger.

DEAL v. BOGUE.

(20 PENNSYLVANIA STATE, 228.)

SHERIFF CAN SELL AND DELIVER NO PART OF PARTNERSHIP GOODS, under an execution at the suit of a judgment creditor of one partner, but only the contingent interest of the debtor partner in the stock and profits after settlement of partnership accounts and payment of partnership creditors.

PLEA IN ABATEMENT IS PROPER MODE TO TAKE ADVANTAGE OF NON-JOINDER OF PARTNER, but is too late after the general issue pleaded. in

trespass by one of two partners against a sheriff for a seizure and sale of goods under an execution against the other partner alone, the declaration alleging that the goods were the goods of the plaintiff.

PLAINTIFF IN EXECUTION MAY BE JOINED WITH SHERIFF AND HIS DEPUTY, in an action of trespass for seizing and selling partnership property on execution against one of two partners, where such plaintiff was present at the sale and purchased a portion of the property.

PARTY CAN NOT COMPLAIN BECAUSE COURT DID NOT GIVE INSTRUCTIONS NOT ASKED, where, if he had sought and obtained them, they must be unfavorable to him.

TESTIMONY OF ONE PARTNER MAY BE CONTRADICTED BY WRITTEN AGREEMENT, by which such partner sold his interest in the partnership property to his copartner, where, in an action by the latter against a sheriff for selling the partnership property on an execution against the former alone, the former testified for the defendant that he owned the property at the time of the levy, and had never perfected the sale to his copartner.

TRESPASS by Bogue, the plaintiff below, against Deal, a sheriff, Tustin, his deputy, and Jeffries, the plaintiff in execution, brought for seizing and selling certain horses, carriages, and sets of harness, on an execution issued in favor of Jeffries against one Archer. Bogue and Archer had been partners in the livery-stable business, but the present action was brought in the name of the former alone, the declaration alleging that the property seized and sold was the goods of the plaintiff, and to this the defendants pleaded the general issue. Bogue claimed the property by virtue of a purchase of Archer's interest, between the time of the levy and sale; but Archer testified, on behalf of the defendants, that when the property was levied on it belonged to him, and that he had never perfected the sale to Bogue. To rebut this, the plaintiff gave in evidence a written agreement under seal, made January 8, 1850, after the levy and before the sale, by which Archer sold and assigned to Bogue all the partnership money, stock, effects, etc. The court charged that this paper was evidence for the purpose of contradicting Archer, and this charge was assigned for error, among others appearing in the opinion. Certain evidence concerning the sheriff's sale also appears in the opinion.

Serrill and J. Fallon, for the plaintiffs in error.

Emlen, for the defendant in error.

By Court, WOODWARD, J. It is established by the verdict, that the goods levied on by the sheriff were partnership property; that they belonged, not to Archer, the defendant in the execution, but to Bogue & Archer, as partners in the livery-stable business.

The defendants on the trial asked the court to say that if, at the time of the levy, the property levied on was the joint property of Bogue & Archer, the plaintiff can not recover. The court declined to give such instruction; but ruled—

1. That the sheriff, though he had a right to seize and make an inventory, had no right to take the goods out of the plaintiff's possession and deliver them to the purchaser.

2. That the proper mode to take advantage of the fact that the plaintiff was not the sole owner of the goods was by plea in abatement, which was too late after the general issue pleaded.

These opinions are assigned for error.

That a sheriff acting under an execution at the suit of a judgment creditor of one partner can sell and deliver no part of the partnership goods, but only the contingent interest of the debtor partner in the stock and profits after settlement of partnership accounts and payment of partnership creditors, is a conclusion that results necessarily out of the principles of the partnership relation, and is sanctioned by a great number of modern decisions, both in England and the United States. What are some of the principles of this relation? It is a contract relation, and therefore no partner can be introduced into it except upon consent. A purchaser at a sheriff's sale of a partner's interest becomes a tenant in common with the other partners so far as to entitle him to an account; but he does not become a partner. On the contrary, the sale works a dissolution of the partnership as completely as the death, insanity, or bankruptcy of a partner will do.

Partners are joint tenants of all the stock and effects employed in their business. No partner can have a separate interest in any part of the property belonging to the partnership, though each has an entire as well as joint interest in the whole of the joint property. A levy, then, to affect the interest of a partner, can not touch a specific proportion of the goods, nor the whole, because others have property in every part as well as the whole, coupled with a right, resting in contract, to use them for the purposes for which the partnership was instituted. The only levy that can be made, consistently with the relation the partners sustain to the goods, is of the debtor's interest in the whole, and that is to be measured by final account.

Again, it was a principle of the Roman law, and it has been acknowledged in the jurisprudence of England and the United States, that partnership creditors must be first paid out of partnership property. Chancellor Kent thinks the basis of the rule

is, that the funds are to be liable on which the credit was given —an opinion which Chief Justice Gibson questioned in *Doner v. Stauffer*, 1 Pen. & W. 204 [21 Am. Dec. 370].

But whatever the grounds of the rule, there is no question concerning the rule itself. It is constantly recognized in distribution of assets, and is the vital element in the contract of partnership which gives it confidence with the public. But if a sheriff may deliver the goods of a firm to purchasers in pursuance of a sale made, not for a partnership debt, but for a debt of one of the partners, what becomes of the equity of joint creditors? They are not in court to contend for the purchase money, and, if brought in and their claims adjusted, that is not the fund to which they gave credit and on which they have a lien. They are creditors of the partnership, and their lien relates to the interest of all the partners in the whole stock, and they can not be compelled to look to any less security. Or, shall they follow the goods sold into the hands of the purchasers? This, in most instances, would be impossible, and always it would be substituting another and an inadequate security for that which they looked to when credit was given to the firm. Thus would the fundamental principles of this beneficial relation be subverted if a sheriff were permitted to seize and sell the whole or part of the stock, in specie, on an execution against one partner.

But it is as clear upon authority as upon principle, that the court were right in denying the power of the sheriff to sell and deliver the goods. In *Taylor v. Fields*, 4 Ves. 396, the facts of which case are more fully stated in a note to *Young v. Keighly*, 15 Id. 559, Chief Baron McDonald laid it down that the party coming in right of the debtor partner comes into nothing more than an interest in the partnership which can not be tangible, can not be made available, or be delivered but under an account between the partnership and the partner. To the same effect is the language of Chief Justice Gibson, in *Doner v. Stauffer*, 1 Pen. & W. 198 [21 Am. Dec. 370]; and in *Kramer v. Arthurs*, 7 Pa. St. 165. See also 1 Story's Eq. Jur. 626, 627, and the cases cited.

Stock in incorporated companies may be levied in execution and sold on *fi. fa.*: *Lex v. Potters*, 16 Pa. St. 295; and yet nobody ever supposed that the property represented by that stock, or any part of it, passed to the purchaser. Even in the sale of land the sheriff delivers not the defendant's possession, but only his title. It is a distinct proceeding that puts the

purchaser into possession, and if the sheriff should deliver possession upon his *venditioni exponas*, he would be a trespasser. The ruling of the court, therefore, was in accordance with the principles and analogies of the law as well as with its authorities.

As to the other point in the charge, the court were unquestionably right. The plaintiff claimed to be the sole owner of the goods, in virtue of a purchase of his partner's interest between the time of the levy and the sale, and to the action instituted in his own name, the defendants pleaded not guilty. After this, it was too late to plead the non-joinder of the other partner in abatement, and yet it was only by such plea advantage could be taken of the non-joinder. If one of several part owners sue alone in trespass, the defendant can only take advantage of it by plea in abatement, though the defect appear on the declaration: *Addison v. Overend*, 6 T. R. 766.

Another ground of defense was, that the plaintiff could not recover against the three defendants jointly. The sheriff and his deputy were liable *virtute officii* for an illegal execution of the writ. If the plaintiff in the execution had merely issued his writ, and left the sheriff to execute it without instructions, I do not say he could have been made liable as a trespasser; but it was in evidence that Jeffries, the plaintiff in the execution, was present at the sale, and bought two of the horses. This was such participation as to make him a trespasser, and he was well joined in the action.

It was contended in the argument that there was no evidence of the delivery of the goods by the sheriff, and as the court held that the trespass consisted, not in levying on the goods, but in the sale of them, they should have instructed the jury that a sale without delivery was not a trespass.

Frederick Dick swore he was present at the sheriff's sale. Seven or eight horses, several vehicles, and six or seven sets of harness were sold; that Tustin told him the amount of the sale was one thousand one hundred and forty-four dollars; that Jeffries bought two horses; "the articles I saw go away." Bogue's establishment was broken up. The goods were delivered to the purchasers."

Rutter says the goods were sold out under the execution; and the return of the sheriff on the *fi. fa.* shows a sale of the goods, and not of the interest of Archer.

Now, in view of such evidence, what other presumption would be reasonable than that the sheriff delivered the goods to the purchasers. If the defendants wanted the opinion of the court

on the question whether such evidence proved a delivery, they should have asked for it. In the absence of a prayer, the court were in no error in submitting the evidence without instructions to the jury. But had the defendants sought and obtained instructions, they must have been unfavorable to them, and therefore they have no cause to complain. In the admission of the paper of the eighth of January, 1850, and in the use that was made of it on the trial, we see no error.

On the whole, no error is discovered in this record, and the judgment is accordingly affirmed.

LEVY ON PARTNERSHIP PROPERTY FOR PARTNER'S PRIVATE DEBT.—The partnership property can not be seized and sold under execution for a partner's private debt: *Morrison v. Blodgett*, 29 Am. Dec. 653, and note; and see *Sutcliffe v. Dohrman*, 51 Id. 450. The principal case has been cited to this point in *Vandike v. Rosskam*, 67 Pa. St. 334; and as to this it was said in *Newhall v. Buckingham*, 14 Ill. 408, to be clearly against the current of authorities. But the interest of a partner may be sold: *Aldrich v. Wallace*, 33 Am. Dec. 495; *Burrall v. Acker*, 35 Id. 582; note to *Morrison v. Blodgett*, *supra*; and see *Doner v. Stauffer*, 21 Id. 370; *Sutcliffe v. Dohrman*, 51 Id. 450; see also the principal case cited to this point in *Lucas v. Laws*, 27 Pa. St. 212; *Hare v. Commonwealth*, 92 Id. 144; *Beatty's Appeal*, 3 Grant Cas. 215; and when partnership property is sold under separate executions against the partners individually, the proceeds represent the several interests of the partners, and not that of the partnership, and must be appropriated accordingly. The principal case was also cited in *Backus v. Murphy*, 39 Id. 401, among others, as discussing the principles of the partnership relation, and the effect of judicial sales of partnership effects, at the suit both of partnership creditors and of creditors or individual members of the firm.

PLEA IN ABATEMENT IS PROPER MODE TO TAKE ADVANTAGE OF NON-JOINDER OF PARTNER: *Bank of Rochester v. Monteath*, 43 Am. Dec. 681; but one partner can not plead the non-joinder of a copartner in abatement, where the contract upon which the action is brought was entered into by the plaintiff with him alone, and without knowledge that it had reference to a partnership transaction: *Cleveland v. Woodward*, 40 Id. 682.

EXECUTION CREDITOR WHEN LIABLE AS TORT-DEFENSOR: See *Hale v. Ames*, 15 Am. Dec. 150; *Barnard v. Stevens*, 16 Id. 733; *Bender v. Askew*, 22 Id. 714; *Duperron v. Van Wickle*, 39 Id. 509; *Lentz v. Chambers*, 44 Id. 63.

NEGLECT IN CHARGE ON POINT, IF NO INSTRUCTION PRAYED, IS NOT ERROR; *Meares v. Commissioners of Wilmington*, 49 Am. Dec. 412, and note.

THE PRINCIPAL CASE IS ALSO CITED IN *Baker's Appeal*, 21 Pa. St. 82; *Lucas v. Laws*, 27 Id. 212; *Whigham's Appeal*, 63 Id. 199, to the point that where the interest of a partner in partnership property passes to another, be it by whatever means, the party coming in in right of the partner comes into nothing more than an interest in the partnership which can not be tangible, can not be made available, or be delivered but under an account between the partnership and partner, and it is an item in the account that enough must be left for the partnership debts.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

GIFFORD v. DYER.

[2 RHODE ISLAND, 99.]

EVIDENCE DEHOES WILL THAT IT WAS MADE UNDER MISTAKE as to the supposed death of the son of the testatrix, whose name was omitted therefrom, is inadmissible to impeach the will, but the mistake must appear on the face of the will, and it must also appear what the will would have been but for the mistake.

APPEAL from a decree approving the will of the appellant's mother. The appellant's name was omitted from the will. Certain bequests were given to his children, and the residue was bequeathed to others. It appeared by testimony that the appellant, at the date of the will, which was made two days before the death of the testatrix, had been absent from his home and family, and not heard from for ten years; that he was supposed to be dead by the testatrix and others, and that his estate had been administered upon. There was also evidence of declarations of the testatrix showing that her will would have been the same if she had known her son was alive.

Sheffield, for the appellant.

A. C. Greene, for the appellee.

By Court, GREENE, C. J. It is very apparent in the present case that the testatrix would have made the same will had she known her son was living. She did not intend to give him anything if living.

But if this were not apparent, and she had made the will under a mistake as to the supposed death of her son, this could

not be shown *dehors* the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake. Thus, where the testator revokes a legacy upon the mistaken supposition that the legatee is dead, and this appears on the face of the instrument of revocation, such revocation was held void: *Campbell v. French*, 3 Ves. jun. 321.

PAROL EVIDENCE THAT CHILD'S NAME WAS OMITTED FROM WILL BY MISTAKE or intentionally, admissibility of: See *Wilson v. Fosket*, 39 Am. Dec. 736, and note. See also *Doane v. Lake*, 52 Id. 654.

PAROL EVIDENCE OF MISTAKE IN WILL, admissibility of, in general: See *Powell v. Biddle*, 1 Am. Dec. 263; *Jackson v. Sill*, 6 Id. 363; *Rothmahler v. Myers*, Id. 613; *Iddings v. Iddings*, 10 Id. 450; *Avery v. Chappel*, 16 Id. 53; *Connolly v. Pardon*, 19 Id. 433; *Comstock v. Hadlyme etc. Soc.*, 20 Id. 100; *Barnes v. Simms*, 49 Id. 435; *Wood v. White*, 52 Id. 654, and notes. And generally, as to the admissibility of parol or other extrinsic evidence to explain or control a will, see *Cloud v. Clinkinbeard's Ex'rs*, 48 Id. 397; *Barnes v. Simms*, 49 Id. 435; *Brownfield v. Brownfield*, 51 Id. 590; *Roberts v. Trawick*, 52 Id. 164; *Yundt's Appeal*, 53 Id. 496, and notes thereto. That parol evidence that a testator otherwise competent did not understand the legal effect of the provisions of his will is inadmissible to defeat the will, is a point to which the principal case is cited in *Barker v. Comins*, 110 Mass. 489.

MOUNT VERNON BANK v. STONE.

[2 RHODE ISLAND, 129.]

PLAINTIFF FAILING TO PROVE FRAUD ALLEGED IN BILL as a ground of relief can not claim relief on independent grounds stated, upon which relief might have been afforded if fraud had not been alleged; as where fraud and failure to account are charged against an agent, and the fraud is not proved.

BILL in equity by principals against their agent. The case appears from the opinion.

Tillinghast and Bradley, for the plaintiffs.

Ames and Polter, for the defendant.

By Court, GREENE, C. J. The bill in this case alleges the appointment of the defendant as agent of the plaintiffs, and states the business which he was to transact in that capacity. It alleges the purchase of books by the defendant, in which to record the business of his agency, and that such books were paid for by the defendant with the moneys of the plaintiffs, and that the books are the property of the plaintiffs. The bill then alleges that the defendant has refused to deliver or exhibit to

the plaintiffs the said books of account, and that the defendant has used the money and other property and credit of the plaintiffs while acting as such agent, by loaning the same and otherwise, and received therefor divers sums of money, for which he has not fully accounted to the plaintiffs.

The bill then charges as follows, viz.: "That the said Stone fraudulently conceals said books of account from the plaintiffs, and hath removed the same from the office and place of business of said agency, founded as aforesaid by the plaintiffs; and that said Stone has received large sums of money belonging to the plaintiffs, and fraudulently retained portions of the same, and appropriated the same to his own use and benefit; and that the said Stone in the accounts he has rendered to the plaintiffs from time to time hath made false and fraudulent representations of his conduct and proceedings, to wit: among others, that he hath represented that he hath received smaller sums of money for interest than he did in fact receive as such agent, and by means of such false and fraudulent representations hath deceived the officers and agents of the plaintiffs, and hath obtained from them a certain release and discharge of a portion of said account, and surrender of the bond executed by said Stone, for the faithful discharge of the duties of said agency."

The bill, among other things, prays that the defendant may be decreed to surrender and cancel the release and discharge by him held from the plaintiffs, and to return the bond executed by him and his sureties for the faithful discharge of his duties in his said agency.

After a careful examination of the evidence in relation to the charges of fraud, we feel bound to say that the plaintiffs in our judgment have failed to prove them, and the only question which remains to be considered in the cause is, whether the bill ought to be dismissed or sent to a master for an account, with liberty to the plaintiffs to prove any error or mistake in the settlement which has heretofore been made, and in the receipt or release given and executed by them, and also to prove any matters of claim not embraced by said settlement. This would be the ordinary course of the court on a bill by the principal against his factor for an account. The difficulty in pursuing this course in the present case arises from the charges of fraud contained in the bill.

We think these charges constitute the principal ground of relief set forth in the bill, and we can not permit the plaintiffs, after having failed to prove the fraud, to fall back on the alle-

gation that the defendant has not accounted, and has not produced and delivered his books of account, and to treat the case as if no allegation of fraud was made. The rule in relation to this subject is stated by the court in the case of *Price v. Berrington*, 7 Eng. L. & Eq. 260. "When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated." And the same principle is recognized in *Ferraby v. Hobson*, 22 Eng. Ch. 255, and in *Glascott v. Lang*, Id. 310.

We think the rule is founded in the highest justice. A plaintiff ought not to be permitted, considering that a court of chancery is always open to allegations of fraud, to speculate upon the chances of relief upon that ground, and failing in that, to fall back upon a different ground.

Bill dismissed with costs, without prejudice, except as to the charges of fraud.

OLNEY v. FENNER.

[21 HALE ISLAND, 211.]

RIPARIAN OWNER ON ONE BANK OF RIVER IS ENTITLED TO FLOW OF WATER past his land unobstructed, and undiverted and without material diminution, and may build a dam to the center of the stream.

RIPARIAN OWNER ON ONE BANK IS ENTITLED TO ONLY HALF THE WATER in the stream, as against an owner of the other bank.

RIPARIAN OWNER DIVERTING STREAM IS LIABLE, NOTWITHSTANDING OBSTRUCTION BY INTERVENING OWNER, for the injury thereby occasioned to a lower proprietor, if the removal of the intervening obstruction would not restore the accustomed flow of the stream.

RIPARIAN OWNER WHO IS ENTITLED ONLY TO WASTE-WATER PRIVILEGE from a mill above him can not complain of a diversion by an owner farther up the stream, so long as his waste-water privilege is not impaired, and the fact that his right is thus limited may be shown in defense to an action for the diversion.

TWENTY YEARS' OPEN AND CONTINUOUS USE OF WATER of a stream by a riparian owner gives a prior right against a lower owner, even though the latter has no need of the water during that time, and the lower owner has only a waste-water privilege.

PART OWNER OF MILL CONVEYING TO CO-OWNER IS ESTOPPED TO COMPLAIN OF DIVERSION of water to such mill existing at the time, in an action against subsequent owners, where he conveys his moiety "with all the privileges and appurtenances," etc., and afterwards buys a mill lower down, which is injured by such diversion.

Case for the diversion of water from the plaintiff's mill on Wood river. The plaintiff proved title to his mill, which was on the Hopkinton side of the river below a small island. The defendants were owners of a mill and dam above the island. The evidence for the plaintiff tended to show that the natural course of the stream below the defendants' dam was on the Hopkinton side of the island, but that the defendants, after carrying the water to their mill, returned it into the channel on the Richmond side of the island, so that it did not supply the plaintiff's mill. The defendants introduced evidence tending to show that the natural course of the stream was on the Richmond side of the island, except for a short time during a certain freshet, and that if it were on the other side it would return there except for certain obstructions placed in the river by the plaintiff, and a certain dam appertaining to a mill known as the Teft mill above the plaintiff's on the Richmond side. The defendant also introduced evidence to show a twenty years' use of the water of the whole stream by the Teft mill; and that the plaintiff had only a waste-water privilege. The facts on that point appear from the opinion. The plaintiff offered evidence to show that in 1834 the water of the river was used by a forge on the Hopkinton side, discharging its water so as to flow by the plaintiff's mill. A defense, on the ground of estoppel, is also stated in the charge to the jury.

Blake and Shearman, for the plaintiff.

Dixon and Updike, for the defendants.

GREENE, C. J., charged the jury. Water is a subtle element, and this case is but one instance of the many difficult and complex questions which grow out of the conflicting claims of its owners. The plaintiff claims by several counts, as the owner of land on Wood river, running by deed to the center thereof, damages for the diversion of the water. Ordinarily, the owner of land bounding on the banks of a river owns to the center of the channel, and may claim as riparian proprietor to have the river flow by his land unobstructed and undiverted in its natural course, and without any material diminution. And even though he makes no use of the water, no one has a right to disturb its natural flow. He has the right to build a dam to the center of the river, and to use his proportion of the water for mill or other purposes, and the opposite owner has the same right on his side. If the same proprietor owns both banks, he

has a right to the use of the whole of the water. These are common-law rights, and if in this case there has been a wrongful diversion, the plaintiff, as owner of one bank of the river, is entitled to damages.

The defendants contend that there has been no diversion since the building of the ancient dam. This is a question for you to determine. If there is as much water on the Hopkinton side and on the Richmond side as used to run there, the plaintiff has no ground for complaint; but if more water is drawn through the flume than used to run over the rolling way, so as to make an increased diversion, then arises the question whether the water so diverted is returned in such a way that it would run past the plaintiff's land and give him the benefit of it. And this also is a question for you to decide.

The defendants are responsible for their own acts, but not for those of others, neither for the erection of the dam nor the filling in of the river. If you think the water was diverted in consequence of the erection of the dam and the filling in with stones, the defendants are not answerable; but if, notwithstanding the removal of the dam and the stones, the river would not return to its natural course, then the plaintiff has been injured. If the whole river were previously discharged on the Hopkinton side, still the plaintiff could have a right to the use of no more than one half, and if it would now run by his land but for these obstructions, he has no ground for complaint, unless its natural impetus has been impaired by the diversion.

But the defendants likewise contend that the Teft mill is entitled to a prior use of the water, and that the plaintiff is not entitled to one half of the water, but only to a waste-water privilege after its use by the Teft mill. The plaintiff stands on his own title, and must prove it. If it be true that he is entitled to only the waste water of the Teft mill, and he gets that now, this is a valid defense. The plaintiff says, indeed, that the right of the Teft mill is no defense for the defendants' act. But this is a mistake. The plaintiff must show a right to the use of the water before he can complain of its diversion. Otherwise, if the plaintiff should recover for the diversion, and the defendants should return the water into its original channel, this would be no bar to a suit by the proprietors of the Teft mill for changing the course of the water, and so the defendants might be mulcted in damages both ways. The plaintiff must show a title in himself, but the defendants may show a title in a third party.

The title set up for the Teft mill is a title by twenty years' user. To give this right, the use must be open, continuous, and uninterrupted. It is immaterial whether the owner below has any need of the water or not. The lower owner has a right to the flow of the whole stream, whether he needs it or not, and a diversion for twenty years confers just as much right against the lower owner, who has no use for it, as against one who needs it all the time for mill purposes. The Teft dam was built in 1812, and in 1822 the right was purchased to continue it to the opposite bank of the stream. This purchase conferred no right to divert the water, and the claim is not of a right by purchase, but an enjoyment of the use of the water by this dam in its present condition for twenty years. On the other side, it is said that the water used by the forge was, until 1834, discharged below the dam. That is for you to determine, and also how much, if any, deduction is to be made from the present use of the water by the Teft dam or the defendants, on that account. If the possessory right of the Teft dam is proved, and the plaintiff is only entitled to the waste water, he has no claim for damages; if it is not proved, or if he receives less now than for the twenty years during which this right was acquired, he has a right to damages for the diversion.

But there is still another defense. In 1844, Pardon Olney, the plaintiff, and John Olney were tenants in common of the mill owned by the defendants. In this year the plaintiff conveyed to John Olney his undivided moiety in said mill estate, together with "all the privileges and appurtenances thereto belonging or in any wise appertaining to the same." Now, we think the plaintiff having sold the property as it was in 1844, and received the purchase money, that it is not competent for him, upon purchasing land below, to claim damages for diversion, however proper such a claim might have been in his vendor, so long as the water remained as it was at the time he sold the mill. If he had owned the land below at the time of the sale, he could not claim the natural flow of the water, because the right to use it in the mode in which it was then used would have passed by the sale, and the land coming to his possession subsequently gives him no right which he would not then have had. This is an estoppel *in pais*, that is, the plaintiff is estopped by his representations from making any claim which shall be inconsistent with them against the person who has expended labor or money upon the faith of such representations. If, therefore, the water is used now as it was in 1844, the estoppel

is a bar to the plaintiff's suit, but it will not cover any change which has been made subsequent to that time.

Verdict for the defendants.

RIGHT OF RIPARIAN OWNER TO NATURAL FLOW OF STREAM through or by his land: See *Newhall v. Ireson*, 54 Am. Dec. 790, and note collecting prior cases in this series. See also *Elliot v. Fitchburg R. R. Co.*, *ante*, p. 85, and note.

LIABILITY OF RIPARIAN OWNER FOR DIVERSION OF WATERCOURSE: See *Plumleigh v. Dawson*, 41 Am. Dec. 199; *Cary v. Daniels*, Id. 532; *Parker v. Griswold*, 42 Id. 739; *Thayer v. Brooks*, 49 Id. 474; *Miller v. Miller*, Id. 545; *Newhall v. Ireson*, 54 Id. 790; *Elliot v. Fitchburg R. R. Co.*, *ante*, p. 85, and notes.

ACQUISITION OF PRIOR RIGHT TO USE OF STREAM BY PRESCRIPTION OR adverse occupancy: See *Society v. Morris Canal Co.*, 21 Am. Dec. 41; *Cary v. Daniels*, 41 Id. 532; *Heath v. Williams*, 43 Id. 265, and note; *Lewis v. Stein*, 50 Id. 177.

HALL v. LAWRENCE.

[2 RHODE ISLAND, 218.]

PARTITION DEED CREATES RIGHT OF COMMON APPURTEnant FOR SEA-WEED, GRAVEL, AND STONE upon one part of the divided tract in favor of the other, so far as the owner of the share to which it is appurtenant may think proper or profitable for use on such part where by the deed there is granted to the owner of such part, his heirs and assigns, "free liberty of carrying away" gravel, sea-weed, and stones on the beach belonging to the other part, "and also liberty to tip the sea-weed on the bank" on such other part.

RIGHT OF WAY INCIDENT TO RIGHT OF COMMON FOR TAKING SEA-WEED, etc., passes by implication, by a grant of such right of common, upon one tract of land in favor of another.

CONVEYANCE OF LAND WITH "APPURTEANCES" PASSES RIGHT OF COMMON appurtenant thereto.

RIGHT OF COMMON IS EXTINGUISHED BY CONVEYANCE OF PART of the dominant estate, if such right is indivisible; otherwise if apportionable.

COMMON IS APPORTIONABLE WHENEVER IT IS ADMEASURABLE.

COMMON APPURTEnant FOR SEA-WEED, GRAVEL, ETC., IS APPORTIONABLE, belonging equally to every acre of the dominant estate.

PROPORTIONATE PART OF COMMON FOR SEA-WEED, ETC., PASSES BY CONVEYANCE OF PART of the dominant estate with "appurtenances," unless the effect would be to surcharge the servient estate, in which event the whole right of common is extinguished.

CONVEYANCE OF PART OF DOMINANT ESTATE TO OWNER OF SERVIENT ESTATE extinguishes common appurtenant for taking sea-weed, gravel, etc., as respects the part so conveyed, but leaves it intact as to the residue.

COMMON APPURTEnant FOR SEA-WEED, GRAVEL, ETC., IS NOT SEVERABLE FROM LAND to which it is appurtenant, and a reservation of such right of common to the grantor in a conveyance of part of the dominant estate is void.

RIGHT IN GROSS AND NOT RIGHT APPURTENANT IS CREATED by an agreement on the part of one tenant in common of a tract of land who is also several owner of an adjoining tract that he will give his co-tenant the privilege of purchasing his undivided moiety of the common land within a certain time at a certain price, and that if such purchase is made, he, his heirs and assigns, shall have an equal privilege with the co-tenant of taking sea-weed on said tract, and this right does not inure to the benefit of one who, after the agreement, but before any purchase of such undivided moiety by the co-tenant, purchases the adjoining tract from the other tenant in common.

BILL to enjoin the defendant from hindering the plaintiff, his tenant, servants, etc., from passing over the defendant's land, taking sand, gravel, sea-weed, and stones from the beach on said land, as they had a right and had been accustomed to do. The defendant's land and that owned by the plaintiff were formerly parts of an entire tract, of which John W. and Nicholas Taylor were tenants in common. In 1776, a partition deed was executed between the said John W. and Nicholas, whereby the land now owned by the defendant was assigned to the said Nicholas, and the remainder of the tract, consisting of forty-nine and three fourths acres, including the land now owned by the plaintiff, was set off to the said John W. By the partition deed the said Nicholas granted the said John W., his heirs and assigns, a right of taking sea-weed, gravel, and stones on his part, in terms stated in the opinion. On March 12, 1803, John W. reconveyed to Nicholas thirty acres off the south side of the tract assigned to him, with the appurtenances. On August 12, 1812, the said John W. conveyed the remaining nineteen and three fourths acres to George Armstrong, together with all the "privileges and appurtenances" of "taking and carrying away gravel and sea-weed," etc. On July 31, 1813, Nicholas Taylor mortgaged the thirty acres reconveyed to him, with the "appurtenances," etc., to the Bank of Rhode Island, and the bank on January 4, 1822, transferred their right, title, and interest to George Armstrong, who, on July 4, 1835, conveyed both the said thirty acres and the said nineteen and three fourths acres, with the "appurtenances," etc., to the plaintiff. The plaintiff, on September 18, 1850, conveyed nine and three fourths acres, part of the said nineteen and three fourths acres, to Robert H. Ives, expressly reserving the privilege of taking sea-weed, gravel, and stones from the Nicholas Taylor farm, as appurtenant to the land retained by the plaintiff. The share of the said Nicholas Taylor under the partition deed before mentioned became by mesne conveyances vested in George Armstrong and

John Wilbour, on February 12, 1835. On February 17, 1835, an agreement was entered into between Armstrong and Wilbour to the effect that for six years Armstrong would not sell his undivided moiety of the Nicholas Taylor farm to any one but Wilbour, that Wilbour within that time should have the right to purchase at the price paid by Armstrong, and that if said purchase should be made, the said Armstrong, his heirs and assigns forever, should have "an equal privilege to get sea-weed on the east and south shores of said farm; that is, the said Armstrong, his heirs and assigns, to get the sea-weed one week at the east shore, and in that week the said Wilbour, his heirs and assigns, to get sea-weed at the south shore," and vice versa the next week, etc. The agreement also provided that Wilbour, his heirs and assigns forever, should have a right of way for carting, etc., from said farm towards Armstrong's house until the way to town was reached. On January 7, 1836, Armstrong released and quitclaimed to Wilbour his share of the Nicholas Taylor farm. On September 5, 1836, Wilbour conveyed the farm to the defendant, reserving "a right which the proprietor of the adjoining farm has to take, carry away, and tip sea-weed, and to carry away stones," etc., "and any claim which George Armstrong may have" by virtue of the agreement and release before mentioned.

Carpenter and Turner, for the plaintiff.

Ames, for the respondent.

By Court, BRAYTON, J. The plaintiff claims in this case a right to enter upon the land of the defendant, being the farm set off to Nicholas Taylor in the deed of partition of 1776, and to take and carry away from the shore thereof, mentioned in the deed of partition, sea-weed, gravel, and stone in any quantity, without limit, at his will and pleasure, and to make merchandise thereof for his profit, and a right of way to pass and repass to and from said shore over the defendant's land for that purpose.

This right he claims as a right in gross, though, by the deed of partition, he claims that it was originally made appurtenant to the north farm set off in said deed to Joseph W. Taylor, under whom he claims.

The arguments, both for the plaintiff and defendant, proceed upon the assumption that the right of taking sea-weed, gravel, and stone, whatever it was, was originally appurtenant to the estate of Joseph W. Taylor; and indeed, if it were not appurte-

nant, it is evident the plaintiff has no title, for his deed from Armstrong describes no such right, and unless it was appurtenant at the time, he takes nothing by his deed.

In order to ascertain what the rights of the plaintiff now are, it is necessary to inquire, first, what were the rights originally granted in said deed to Joseph W. Taylor.

By the terms of the deed, after setting off to Nicholas the south part of the original farm, upon which portion was all the beach, and setting off to Joseph the north part, which was less in quantity, and we may presume, without a beach privilege, less in value, the deed then proceeds and says: "And the said Nicholas Taylor doth grant free liberty of carrying away gravel and sea-weed off the beach belonging to his part of said farm, and also stones below high-water mark on said beach, to the said Joseph W. Taylor, his heirs and assigns, and also liberty to tip the sea-weed on the bank on his part of said land."

This grant is made doubtless to equalize the partition, to render the north part, which had no shore where sand and sea-weed might be obtained for improving and fertilizing the land, and it may be, less facilities for obtaining stone for building and fencing, equal in value with the south part.

It will be seen also that the grant is not limited in terms as to quantity, nor is it defined in terms to what uses it shall be applied or for what purposes taken, so as to furnish a just measure of the amount which Joseph might take.

We must, however, presume that it is not to be entirely without limit, extending to the entire quantity of gravel, sea-weed, or stone upon the shore, and thereby excluding Nicholas; but that the right of Joseph was to be a right in common with Nicholas. So it must have been the intent of the parties, that, as the right was created for the benefit of the north shore, and as it must have some limit as to the amount, it should be limited in extent to the uses of the land set off to Joseph, and so it must necessarily become appurtenant; Joseph would not, however, be confined to so much only as might be necessary of necessity to the estate, but as the grant was liberal—"free liberty"—might take so much as he might have occasion to use for any purpose upon the estate.

The plaintiff's counsel contends that under this grant, upon a just construction of it, Joseph originally had a right to take for sale and profit, without regard to any use; and the case of *Phillips v. Rhodes*, 7 Met. 322, is cited to that point, in which it is held, that under a right of common to take sea-weed appurte-

nant to the estate and intended for a dressing for the land, it might, when taken, be applied to that use or sold. No reason is given nor authority cited, and we are left upon the authority of the case alone. It is not easy to perceive the reason, if the extent of the right were to be measured by the use and purposes of the estate. But without determining whether, when once taken for use, the party might not forego the benefit of it to his estate and sell to another, the conclusion, we think, is warranted that the sale would not give him a right to take more than reasonably he might have taken had he thought fit to use it upon the estate.

The effect of the grant in the deed of partition is to create a right of common for sea-weed, gravel, and stone in favor of the north farm set off to Joseph, and as appurtenant thereto, to be exercised on the shore of the estate set off to Nicholas, giving a right to take so much as the owner of the north shore might think proper or profitable to use on the estate.

There passed also, as incident to this grant, a right of passing and repassing to and from the shore over the land of Nicholas, in some convenient place, for the purpose of taking the profit. This was necessary to the enjoyment of the right of common granted, and would therefore pass by an implied grant, and accompany and follow the principal grant so long as it existed, and only become extinguished with the extinction of the common itself.

So also a grant of land over which the grantor has a way of necessity to him for the enjoyment of another estate does not extinguish the way, but the way is by implication reserved.

This right of way incident to the right of common falls under the head of secondary easements, and the objection raised that it was not appurtenant to the north farm, and would not pass under the term "appurtenance," is not tenable.

Did these rights pass to the plaintiff? George Armstrong, by his deed of July 4, 1835, conveyed to the plaintiff all the land originally set off to Joseph W. Taylor in the deed of partition of 1776, with the appurtenances, and whatever rights of common were then appurtenant to the lands conveyed or to any portion of them passed to the plaintiff. Our inquiry, then, must be directed to the title which Armstrong had to the common.

Armstrong's title to the land is derived to him by two separate conveyances. By the deed from Joseph W. Taylor, of August 12, 1813, he acquired title to nineteen and three fourths

acres, a portion of the land originally set off to Joseph, "and all the privileges and appurtenances which I, the grantor, now have of taking and carrying away gravel and sea-weed, and all stones below high-water mark on said beach, and also to tip the sea-weed on the beach of the said Nicholas Taylor's land." Such are the words of the grant.

But whether any right of common then remained appurtenant to the nineteen and three fourths acres must depend upon the effect which is to be given to the conveyance of Joseph W. Taylor to his brother Nicholas, of March 12, 1803. By that deed Joseph conveyed to Nicholas thirty acres, part of the share set off to him, to which the whole right of common was made appurtenant.

The defendant's counsel claims that the effect of the conveyance of the thirty acres' portion of the dominant estate is the extinguishment of the whole common.

The first question here raised is whether this right of common was divisible, and might or not be apportioned to the several parts of the dominant estate upon a severance of the estate. In regard to rights of common which by law are indivisible, a conveyance of any portion of the dominant estate will extinguish the whole, as in the case of common of estovers: *Van Rensselaer v. Radcliff*, 10 Wend. 639 [25 Am. Dec. 582]; *Livingston v. Ketcham*, 1 Barb. 592; and the reason assigned is that the service is entire and appurtenant to an entire estate, and not being divisible, it can not be appurtenant to part of the estate as an entire service.

There are, however, other rights of common which are in law divisible, and in all such cases it may be apportioned to the several parts of the dominant estate upon its severance by different conveyances. A right of pasture for cattle *sans nombre* is of this kind. In such case, it is held that though the right be unlimited in terms, yet it is intended for the use of the estate, and limited to such cattle as may be kept upon the dominant estate, or upon any portion of it, and equally upon any portion, so that upon a division of the dominant estate and upon apportionment of the service to the several parts, the servient estate is not charged to any greater extent than before, or with more cattle. And the rule is, that wherever the common is admeasurable, the common is apportionable: *Tyrringham's Case*, 4 Co. 35. But the right, being measured by the uses of the estate, can not be severed from the estate and granted over: *Drury v. Kent*, Cro. Jac. 15.

The right in the present case is of the same nature. It is intended for the use of the estate, and for every acre of it, and that equally, and whether the right be divided or not, the measure is the same. It may therefore be divided, and by a conveyance of a part of the dominant estate, it would be apportioned to the part conveyed, and so much might well pass with it under the term "appurtenance."

This conveyance may be affected by another rule, for though the common may be in its nature divisible and apportionable, yet, if the effect of the conveyance is to surcharge the servient estate, it shall not only not be apportioned, but shall become extinct for the whole.

And for the same reason it is that a release of a portion of the servient estate, or purchase of part of the servient by the sole owner of the dominant, shall extinguish. In *Rotherham v. Green*, Cro. Eliz. 593, there was a release of part of the land in which, etc. In *Kimpton v. Bellamy*, 1 Leon. 43, the owner of the dominant purchased two acres of forty of the servient estate. In these cases the effect was to surcharge the residue. So in *Tyrringham's Case*, 4 Co. 35.

In *Wild's Case*, 8 Co. 78, there was a conveyance of five acres of the forty contained in the dominant, and on the same reasoning it was held that the servient estate was no more chargeable upon the severance of the dominant estate than before, for that the five acres were entitled to common for the cattle levant and couchant thereon as before, and for no more.

And the rule deducible from all the cases is as before stated, that if the effect of the conveyance is to surcharge the common and burden to a greater extent the servient estate, it shall extinguish; if otherwise, there shall be an apportionment, and such portion will pass as appurtenant.

By this rule, the portion of common belonging to the thirty acres would become severed from the residue, which would remain appurtenant to the nineteen and three fourths acres retained by Joseph Taylor, and the thirty acres would become a distinct dominant estate.

But inasmuch as the title to the dominant estate, by virtue of the conveyance, became united in the hands of Nicholas with the servient estate, all the common appurtenant to the thirty acres thereby became extinguished by unity of title. It has not been revived by any of the conveyances, so as to pass by the term "appurtenance" in the deed of Armstrong to the plaintiff.

The defendant's counsel claims that although such would be

the effect of the deed to a stranger who immediately conveys to the servient owner, yet if made directly to the servient owner, the whole is extinguished.

Now, bearing in mind the reasoning on the cases generally upon the subject, and the rules deducible from them, we should not expect to find a case in which it should be held that where the conveyance does not directly surcharge the common remaining, and where the servient owner can in no wise suffer injury, the whole common should become extinguished, and that against the apparent intent of the parties, but that effect would be given in such case to the clear intent.

There is, however, in *Tyrringham's Case* the annunciation of such a rule as the defendant's counsel claims. It is this: that common appurtenant can not be extinct in part and *in esse* for part, by act of the parties, for that common appurtenant was against common right. Taken in the broad sense which counsel gives it, and independent of the connection in which it is used, it might support the ground which the counsel assumes. But taken with its connection, it is evident that it was not applied, or intended to apply, to such a case as is now before us. The same rule exists in relation to rent-charge, which is said to be against common right, as distinguished from rent-service, which is deemed of common right.

The only American case cited upon this point is that of *Livingston v. Ten Broeck*, 16 Johns. 14 [8 Am. Dec. 287], and as this is claimed to conclude this point, it will be necessary to examine it with a little particularity.

The statement of the case shows that a certain estate called the Vosburg farm was entitled to common in a large pasture within the manor of Livingston, and that Henry Livingston was sole owner of fifty acres of land, parcel of the tract in which common was to be taken, but as it did not appear whether or not the conveyance to Henry Livingston comprehended a portion of the Vosburg farm, a new trial was necessary, and Mr. Justice Spencer, who delivered the opinion thereupon, says he does not see how the question can now be raised; but, in view of a new trial, it is proper that the court should express an opinion, and he proceeds to give it. He then deduces the general rule, and says the governing principle is that injustice shall not be done to the servient estate; and if it shall be found that Henry Livingston purchased part of the Vosburg farm (which was the dominant estate, he being owner of a portion only of the servient), the whole common should be extinguished,

because he is then interested in discharging his own land and surcharging the residue.

There is nothing in the case or in the opinion delivered which indicates any intention in the court to go beyond the *Case of Tyrringham*. The whole opinion is based upon that case, which, as Justice Spencer remarks, was affirmed for good law in *Wild's Case*, and had never been overruled.

Now, *Tyrringham's Case*, when carefully examined, it will be seen, does not come up to the point made by the defendant's counsel. That was a case involving the same principles as that of *Livingston v. Ten Broeck*. It was this: Boniface Pickering was the owner of forty acres, part of a tract of seventy acres, which constituted the servient estate (the residue, thirty acres, being owned by one John Pickering). He purchased the whole of the dominant estate. It was resolved "that when part of the land to which, etc., is aliened, then every of them may prescribe to have common for cattle levant and couchant upon the land, and in none of these cases any prejudice accrues to the tenant of the land in which, etc., for he shall not be charged with more upon the matter than before the severance, and God forbid," say the court, "the law should not be so when part of the land to which, etc., is aliened, for otherwise, many commons in England would be extinguished and lost." And it was agreed that such common as is admeasurable shall remain after severance of part of the land to which, etc. But inasmuch as the court resolved that the common was appurtenant, and not appendant, and so against common right it was adjudged that by the said purchase the common was extinct; and the reason, "for in such case common appurtenant can not be extinct in part and *in esse* for part by act of the parties." Now, the case was: the owner of part of the servient became owner of the whole dominant, and so interested in surcharging the residue of the servient.

But in order fully to understand the case and the point immediately before the court, it must be borne in mind that so far as the severance and apportionment of the common to the dominant estate is concerned, there is no difference in the rule of law applicable to common appurtenant or common appendant. In either case, upon severance of the dominant estate the common was apportionable. The difference between the two related to the servient estate, and the court, in a preceding part of the case, had resolved that common appendant, being of common right, might not only be apportioned to the land to which, etc.,

but would also be apportioned upon the severance of the estate in which, etc., and they say, that as to this kind of common, if the commoner alien part of the land in which, etc., yet the common shall be apportioned. But it was not so with common appurtenant. In such case there could be no apportionment to the servient estate. And therefore the court were obliged to say, referring particularly to the part of the case before them, that by this purchase the common was extinct for the whole, for in such case common appurtenant could not be extinct in part and *in esse* for part by act of the parties.

There never was any difficulty in releasing a portion of the service charged upon the servient estate. The only difficulty was in releasing any portion of the servient estate wholly from all service, and that, because it could not be apportioned.

The points resolved in *Tyrringham's Case* might then well be affirmed for good law as they were in *Wild's Case*, where it is said: "It was well agreed that common appendant was of common right severable, and although the commoner in such case purchase parcel of the land in which, etc., yet the common shall be apportioned, but in such case common appurtenant and not appendant by purchase of parcel of the land in which, etc., is extinct, for the causes and reasons given in *Tyrringham's Case*;" and as a further reason, "It was folly for the commoner to intermeddle with part of the land in which, etc., which belonged not to him, but when he intermeddled but only with his own land by alienation thereof, it shall not turn to his prejudice, for that it is not against any rule of law, as the other case."

The agreement entered into between Armstrong and Wilbour July 17, 1835, which was referred to as affecting this right, we do not see has any effect to vary the rights of the parties in this respect. That agreement is intended to create a new right in the contingency that Wilbour should purchase the right of his co-tenants. There was no conveyance of any lands to which it could be appurtenant by implication, and it is not expressly made appurtenant to any. It must have been when it came *in esse* a right in gross, and had it been intended to be appurtenant, it was not *in esse* at the time of Armstrong's conveyance to the plaintiff, so as to pass by the deed.

Neither can the exception in the covenant of warranty made by Wilbour in his conveyance to the defendant vary those rights. There was a right of common in the estate conveyed, appurtenant to the nineteen and three fourths acres, and he excepts

"a right which the owner of the adjoining farm has," and his exception was equally necessary to his protection, whether the right were appurtenant to the whole farm or to the smallest portion of it only. It is a recognition of such right to some extent, and is sufficiently answered by the smallest extent.

We are, then, upon the whole, of the opinion that the deed from Joseph W. Taylor to Nicholas Taylor, of the thirty acres, operated as a severance and apportionment of the common, and that the part apportioned to the thirty acres became extinguished and lost, but that the conveyance did not operate to extinguish the residue of the common apportionable to the nineteen and three fourths acres, and that so much passed by Armstrong's deed of July 4, 1835, to the plaintiff, with a right of way as incident to it and necessary to the enjoyment.

Had the plaintiff remained owner of the whole of this lot of nineteen and three fourths acres, he would still have been entitled to the common appurtenant. But his right has again been affected by his conveyance to Robert H. Ives, of nine and three fourths acres, part of the nineteen and three fourths acres. Had he made no reservation of the common in that deed, there would have been an apportionment, and Ives would have taken the portion belonging to nine and three fourths acres; for though such common may be apportioned, it could not be severed from the estate and granted over: *Drury v. Kent*, Cro. Jac. 15; and because it could not be severed, the plaintiff could not retain it to himself. If it exist at all, it must exist with the estate, the uses of which it is to attend and minister to.

The plaintiff, then, at the time of filing his bill in this case, had a right of common to take from the shore of the defendant's estate sea-weed and gravel, and stones below high-water mark, at all times at his will and pleasure, for such purposes as he might think proper to use them upon his estate; but this right did not extend to the thirty acres, to which Armstrong derived title under the mortgage of Nicholas Taylor to the Bank of Rhode Island, all right being extinguished as to that, but was limited to that portion of the nineteen and three fourths acres conveyed by Joseph W. Taylor to Armstrong, by deed of August 12, 1813, which the plaintiff has not conveyed to Robert H. Ives; and he had also a right of way to and from his said land to the shore for the purpose of exercising this right as incident and necessary to its enjoyment.

This is the extent of his right in our view upon the deeds and conveyances put before us.

RIGHT OF COMMON IS APPORTIONABLE, WHEN: See *Livingston v. Ten Broeck*, 8 Am. Dec. 287, and note; *Van Rensselaer v. Radclif*, 25 Am. Dec. 582. Apportionment of easement of way on division of the dominant estate: See *Watson v. Bioren*, 7 Id. 617.

EXTINCTION OF COMMON BY UNION OF TITLE in dominant and servient estates: See *Livingston v. Ten Broeck*, 8 Am. Dec. 287; *Van Rensselaer v. Radclif*, 25 Id. 582. As to extinguishment of easements by such unity of title, see *Ritger v. Parker*, 54 Id. 744; *Pearce v. McClenaghan*, 55 Id. 710, and notes. See also *Ferguson v. Witsell*, post. p. 744.

CASES IN EQUITY
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

LOWRY v. O'BRYAN.

[*4 Richardson's Equity, 262.*]

ESTATE OF EACH LEGATEE IS ABSOLUTE, BUT DEFERABLE ON CONTINGENCY
of his dying without issue, leaving one or more of his brothers surviving, where a testator bequeathed the remainder of his estate to his four sons, "to them and their heirs forever," but "if either of my sons should die without issue, his part shall be equally divided between the survivors;" and a son who died leaving issue has no interest which his administrator can claim, in the share of his only surviving brother, who afterwards died without issue.

COMPLAINANT, who was the administratrix of the estate of William Brown, claims an interest in the estate of Charles Brown. Robert Brown, the father of Charles and William, had died, leaving a will, which contained the following residuary clause: "I give and bequeath unto my loving sons, William Brown, George Brown, Robert Brown, and Charles Brown, all the remainder part of my estate, to be equally divided between them, share and share alike, to them and their heirs forever; and I also will and desire that, if either of my sons should die without issue, his part shall be equally divided between the survivors." The sons George and Robert afterwards successively died without issue, and their shares were divided among the surviving brothers. William, the former husband of the complainant, then died in 1815, leaving two children, who also died in their infancy. The fourth son, Charles, died in 1848, without issue, having bequeathed his estate to the children of the defendant, and appointed the defendant executor of his will. The circuit chancellor held that the complainant could have no right which

did not belong to her intestate, and that William, who had died before Charles, could take nothing as the survivor of the latter. The court was further of the opinion that the interest of Charles, as last survivor, became absolute, and might well pass under the bequest he had made. The complainant's bill was therefore dismissed, and she appealed, claiming that on the death of her intestate, leaving issue, his interest in Charles Brown's share became transmissible to his representatives; and that if she were not able to sustain her bill as administratrix solely, yet she was William Brown's sole surviving distributee.

Rhett and Tracy, for the appellant.

Henderson, contra.

By Court, DUNKIN, Chancellor. By the will of Robert Brown, it is quite clear that each of his four sons took, not merely a life interest, but an absolute estate in the personality bequeathed to them. It is to be equally divided between them, "share and share alike, to them and their heirs forever." But this absolute estate was defeasible on a contingency, "if either of my sons should die without issue, his part shall be equally divided between the survivors." Charles Brown, defendant's testator, was the last surviving child of his father, Robert Brown. The complainant's intestate had been dead thirty years before his brother Charles died. Complainant's intestate left issue, and his absolute interest in the share bequeathed to him was, therefore, indefeasible. But it is insisted, on the part of the appellant, that her intestate had an interest in Charles' share, which was transmissible to his representatives, and that, on the death of Charles without issue, she, as administratrix of William Brown, deceased, became entitled to the estate, although her intestate died before his brother.

If the position assumed by the complainant be correct, it is obviously fatal to her claim. The gift to the first taker is in the most ample terms, "to him and his heirs forever; but if he die without issue, his part shall be equally divided between the survivors." The only ground upon which this limitation over can be sustained, as demonstrated in *Massey v. Hudson*, 2 Meriv. 130, and *Postell v. Postell*, 1 Bail. Eq. 390, is that "it was intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest, which might or might not be accompanied by actual possession;" otherwise, although there should be no such failure of issue as would enable him personally to take, yet his repre-

sentatives would be entitled to claim in his right whenever the failure of issue should happen, which might be fifty years after the death of the first taker. "Unless the term 'survivor' has the effect of limiting the generality of the expression 'dying without issue,'" in other words, if it is not a personal, but a transmissible, interest which is intended, there is no ground to support the limitation over, and the interest of the legatee would be absolute and indefeasible.

It may be further remarked, that if the limitation over were not too remote, but might take effect on the failure of issue at any time, there would be more legitimate ground for argument that the defendant, representing the last surviving brother, was entitled to the share of William Brown, the complainant's intestate, than that the complainant would take Charles' share. For although William died leaving issue, yet the issue became extinct in the life-time of Charles, who was then the last survivor. But upon the principle and the authorities before stated, William having left issue at the time of his death, his estate is indefeasible, although the issue might afterwards fail. It is an entire misapprehension to suppose that the vesting of the estate depended upon the legatee having or leaving issue. It vested immediately on the death of Robert Brown, the original testator, and was defeasible only upon the happening of a contingency. If that event occurred, it was limited over to certain persons. None are entitled but those who can bring themselves within the description at the happening of the contingency. Neither the complainant nor any one else answered the description at the death of Charles Brown, who was the last surviving brother. Under these circumstances, it was held by the chancellor that, as it was the manifest intention of the testator to part with his whole estate, and as at the death of Charles Brown there was no one capable of taking under the description of survivor, his estate was absolute, and such conclusion has the sanction of *Powell v. Brown*, 1 Bail. L. 100, and the authorities there cited. But this is an unimportant inquiry. If the result were otherwise, and it became a case of intestacy, none could claim but the legal representative of the original testator, and that character is not sustained by the complainant.

The appeal is dismissed.

JOHNSTON, DARGAN, and WARDLAW, Chancellors, concurred.

Appeal dismissed.

BEQUEST TO CLASS WITH LIMITATION TO SURVIVORS: In *Spruill v. Moore*, 49 Am. Dec. 428, it was held that where a testator bequeathed slaves to his four daughters, with a limitation that in case any of the daughters died without issue, then the survivors or survivor should have the negroes and their increase, the interest taken by a daughter who died leaving issue, after the death of another daughter unmarried, was the share given her by the will, and one third of the share of the daughter who died, but her issue had no interest in the share of a daughter subsequently dying without issue; but see *Mowatt v. Carow*, 32 Id. 641; and for a similar limitation held to be too remote, and consequently the legatees took an absolute estate, see *Shephard v. Shephard*, 46 Id. 41. The principal case was referred to in *Mendenhall v. Mower*, 16 S. C. 314, on the point that the words "surviving children" had the effect of controlling the generality of the phrase "dying without issue," and of fixing the death of the first taker as the time when the limitation was to take effect.

EX PARTE GEDDES.

[4 RICHARDSON'S EQUITY, 301.]

WIFE'S TITLE OR INTEREST IN HER LAND CRASES, AND ATTACHES UPON MONEY ARISING FROM SALE, when the land is sold for the purpose of partition, under a decree of court.

HUSBAND MAY PURCHASE LAND IN WHICH WIFE HAS SHARE, AT PARTITION SALE decreed by the court, and hold the same clear of any title or claim on the part of the wife, but over the wife's interest in the purchase money he has no control further than is permitted by the wife or authorized by an order of court.

WIFE MAY WAIVE HER EQUITY IN MONEY ARISING FROM SALE OF HER LAND under a decree of court for the purpose of partition, by joining with her husband in a receipt therefor; and if she does this, the marital rights of the husband attach.

PETITION by Caroline Geddes, executrix of her husband, Gilbert C. Geddes, and a creditor of the latter, praying for a sale and distribution of the estate. An order was granted for a sale, and this case came up on the master's report and exceptions. The part of the report which is the subject of controversy is set forth in the opinion.

Lesesne and Petigrue, for the appellants.

McCrady, contra.

DARGAN, Chancellor. This case comes up on the master's report and exceptions. The part of the report which is the subject of controversy relates to the lot of land No. 16 Rutledge street. The commissioner reports that this lot was "sold under a decree of this court for partition between Mrs. Geddes and Mrs. Milne in February, 1840. Gilbert C. Geddes was set down as the purchaser, but he paid only Mrs. Milne's

share, or half of the net sales, to wit, three thousand nine hundred and fifteen dollars and thirty-seven cents, and gave Master Laurens his and Mrs. Geddes' joint receipt for the other half, taking his title for the property. But as the lot remains undisposed of by Mr. Geddes, I submit that his undivided half or interest in it ought to be sold for the benefit of creditors."

When the wife's land is sold for the purpose of partition under a decree of the court, she becomes thereby divested of her title and inheritance in the land, and she becomes the equitable owner of the money or fund arising from the sale, or of her just proportion of it. Her title or interest ceases in the land, and attaches upon the money. I perceive no reason why the husband should not become the purchaser at such a sale as well as a stranger. And when he obtains the master's title, the land is his property, clear of any title or claim on the part of the wife. Over the purchase money, however, he has no control further than is permitted by the wife or authorized by an order of the court.

The equities of the wife in the purchase money arising from the sale of her inheritance under circumstances like these has been very clearly defined by a series of decisions of our own courts. The master has no right to pay it to the husband on his own receipt, except under an order of the court. If he does, the payment is no discharge to him as against the claim of the wife; or she may elect to set up her claim by bill against the husband himself, as having illegally possessed himself of her funds. But she may waive her equity by joining with her husband in a receipt, or doing some equally significant and unequivocal act. If she does this, the marital rights attach, as upon personality, and she can not afterwards recall her equitable claim. The *rationale* of these principles is this: The land was her inheritance. The sale does not in this court, *ipso facto*, convert it into personality, but it retains in equity its character of real estate. She has a right to a settlement. As before the sale under the decree, the husband could not sell her inheritance without her concurrence and formal renunciation, as prescribed by law; so after the sale, no act of the husband alone can deprive her of this right, of which she can not be divested except by a decree of the court, or some formal renunciation of her equity in the fund. If the husband were permitted to give receipts for the wife's funds arising from the sale of her land, it is obvious she might be deprived of her equitable rights without notice of the proceeding or opportunity of asserting them:

Wardlaw v. Gray, 2 Hill Ch. (S. C.) 644; *Yeldell v. Quarles*, Dud. Eq. 55; *Geiger v. Geiger*, Cheves Eq. 162; *Ex parte Mobley*, 2 Rich. Eq. 56; *Daniel v. Daniel*, Id. 115. To which may be added the unreported cases of *Gardner v. Horton*, Columbia, May term, 1849; *Davenport v. Davenport*, Id., December term, 1849.

If Mrs. Geddes had been a *feme sole* at the sale of her inheritance for partition, and had herself become the purchaser at the master's sale, she would have bought her own share, and the moiety of her co-tenant in common. The case reduced to its essence then, would be, that she was the purchaser from herself and her sister. But a person can not purchase from himself. The result of the proceeding would have been simply to blend the title of her co-tenant with her own. And I incline to the opinion, that in any question which might have arisen in the case supposed, in which the distinction would have been important, the title of Mrs. Geddes to her own moiety would be referred to its original source, and would not have been considered to be derived from the proceedings in partition. This rule would apply, because in such a case, as to her moiety, she was seised of the fee before the sale, and the sale could give her no more. There would be no change of title whatever; the result would be the same as if her co-tenant, without any sale for partition under decree, had conveyed her share to Mrs. Geddes.

But the case is entirely different when the husband is the purchaser. He purchases in another right than that of his wife. He purchases in his own right. The title is changed. Before the sale he held as husband; afterwards, as a purchaser from the wife. Surely the court of equity, in proceedings for partition, can, when the proper forms are observed, convey the wife's lands to the husband for a consideration. That consideration is the purchase money to which the wife's equity attaches. It is for herself to determine whether she will waive it. It is a matter for her own private discretion with which, if she be of age, the court will not interfere. It would only be disposing of her equity in the purchase money, as she might have disposed of her legal estate in the lands, by joining with her husband in a conveyance under the proper legal forms.

The conclusion and judgment of the court is, that the lot in Rutledge street is the property of the estate of Gilbert C. Geddes, and that Caroline Geddes has no interest therein except her dower.

By COURT. This court is entirely satisfied with the decree of the chancellor, which is in conformity with the numerous decisions in this court. It is therefore ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and WARDLAW, Chancellors, concurring.

Decree affirmed.

WIFE'S EQUITY TO SETTLEMENT.—For the cases in this series arising under this head, see the note to *Wiles v. Wiles*, 58 Am. Dec. 733; and see particularly, as to the wife's equity to a settlement out of the proceeds of her realty sold by order of court, *Daniel v. Daniel*, 44 Id. 244. The principal case was cited in *Clark v. Smith*, 13 S. C. 596, to the point that it is considered sufficient evidence of a wife's waiver of her equity to a settlement out of funds arising from the sale of her real estate, when she joins her husband in a receipt therefor, or does some equally significant and unequivocal act.

McCALL v. McCALL.

[*4 RICHARDSON'S EQUITY*, 447.]

DESCRIPTION OF SUBJECT OF BEQUEST, IF FALSE IN PART, MAY BE MADE SUFFICIENTLY CERTAIN to identify it, by reference to extrinsic circumstances.

CERTAINTY IN DESCRIPTION IS SUFFICIENT TO SUSTAIN BEQUEST, and slaves named "Little Harriet" and "Manza" pass under a bequest of "Little Harry" and "Alonzo," where a testatrix owning sixty-four slaves bequeathed sixty-two by name, two of which were called "Little Harry" and "Alonzo," and afterwards by codicil bequeathed two others by name, as "two negroes not named in her said will," the testatrix having no other slaves except Little Harriet and Manza, and none by the names of "Little Harry" and "Alonzo."

BILL to obtain a construction or correction of the will of Hannah Sanders. The will made bequests of sixty-two negroes in all, by name, contained a residuary clause disposing of the "rest and residue of her estate, if there be any," and embodied the following clause: "I give and bequeath the following negroes, to wit, Betty, August, Eliza, Philip, Little Harry, and Alonzo," to the plaintiff in trust, "for the sole and separate use, benefit, and behoof of Elizabeth H. Haynsworth, wife of Thomas B. Haynsworth." A codicil was afterwards added to the will, by which the testatrix made a bequest of two negroes named Lydia and Tom, as "two negroes not named in her said will." It appeared at the hearing that the testatrix had at the date of the will sixty-four slaves in all. Certain evidence was

received, subject to objection, showing that the testatrix directed her lawyer who drew the will to dispose of Betty, August, Eliza, and Eliza's children, in trust for Mrs. Haynsworth; that Eliza's children were named Philip, Little Harriet, and Manza; that the testatrix not knowing or remembering the names of the two latter, called in a servant, from whom the counsel understood the names to be Little Harry and Alonzo; that the will was so drawn, and afterwards read and executed; and that the testatrix had no negroes by the names of Little Harry and Alonzo. The chancellor at the circuit held that the case was not one where parol evidence was admissible to explain an ambiguity, and ordered the bill to be dismissed. The complainant appealed, on the grounds that the testimony of the lawyer who drew the will, and of the witness who was present when the instructions as to the manner of disposition were given, should have been received; and that by the case made by the pleadings, the complainant was entitled to a decree for the slaves.

Moses, for the appellant.

Harllee, contra.

By Court, WARDLAW, Chancellor. In ascertaining the subject of a testator's disposition, the court may inquire into the situation of his estate, and into every material fact which is auxiliary to the just interpretation of his words, for the purpose of identifying the thing intended by the words employed.

In the present case, if the codicil had never been executed, it would appear from the will and competent evidence that the testatrix owned sixty-four slaves, of which, excluding the two improperly named, sixty are bequeathed. If the construction of the legacy to the plaintiff were to be made in this posture of affairs, it might be doubted whether the legacy of the two negroes in question would not be made up by applying it to Tom and Lydia, as well as by applying it to Harriet and Manza; and it might be dangerous to apply it to either by parol proof.

But if the codicil afterwards made, specifically disposing of Tom and Lydia, had been introduced originally as a clause of the will, the case would then be that a testatrix having sixty-four slaves bequeaths sixty-two of them specifically and without ambiguity, and bequeaths two other slaves, but applies wrong names to them. In that condition of things, we should ascertain from the will and the evidence that nothing was left upon which the legacy to the plaintiff in trust for Mrs. Hayns-

worth could operate, so as to give her the number of negroes expressly intended for her, unless we resorted to Harriet and Manza.

The bequest being of negroes, there is enough of certainty in that description to sustain the gift, notwithstanding the partial misdescription arising from the misnomer. The legacy can not be applied to horses, or to any other thing than negroes; and it should be applied to negroes, if these be found.

A description false in part may be made sufficiently certain by reference to extrinsic circumstances to identify the subject intended; as where a false description is superadded to one which by itself is correct and adequate. Thus, if a testator bequeath his black horse, having but one horse which was white, or devise his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other clearly pass. The substance of the subject intended is certain, and if there be but one such substance, the superadded misdescription inapplicable to any subject introduces no ambiguity. Any evidence is admissible which merely tends to explain and apply what the testator has written, and no evidence can be admitted which merely shows what he intended to write. The most accurate description of the subject of a gift in a written instrument requires identification by proof of extrinsic circumstances; and the least accurate description which satisfies the mind of the court of the donor's meaning is within the same principle. If the judgment of the court be founded upon a comparison of the terms of description employed in the written instrument with the extrinsic evidence of the identity of the subject, no attempt is made to vary a written instrument by parol evidence, nor to ascertain the intention of the donor independently of his written words. The court does no more than to ascertain the application of the descriptive words in the instrument of gift: Wigram on Wills, pl. 9, 67, 70.

The sound doctrine on this subject is well stated in Swinburne on Wills, 895, pt. 7, sec. 5: "The error of the testator in the proper name of the thing bequeathed doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed be certain: for example, the testator doth bequeath his horse Bucephalus, whereas the name of his horse [testator having, as I understand the example, but one horse] is Arundel; this error is not hurtful, but that the legatary may obtain the horse Arundel, if the testator's meaning be certain: for

names were devised to discern things: if therefore we have the thing it skilleth not for the name. The error in the name appellative of the thing bequeathed doth destroy the legacy: for example, the testator intending to bequeath a horse doth bequeath an ox, or meaning to bequeath gold doth bequeath apparel; in both these cases the legacy is void. The reason of this difference is because a proper name is an accident attributed to some singular or individual thing, to distinguish the same from other singular things of the same kind; whereas names appellative do respect the substance of things, and being common to every singular of the same kind, make them to differ from things of other kind or substance."

It is justly remarked by Judge Richardson, in *The State v. Scurry*, 3 Rich. 68, that "the names of slaves are vague and vary like the names often applied to other chattels."

The testatrix in the case before us had the right to change the names of her negroes at her will. That she exercised this right in relation to Harriet and Manza is plausibly argued from the fact that in the codicil she bequeaths Tom and Lydia as "two negroes not named in her said will," and leaves the other negroes to pass by the names mentioned in the will. That she could not have intended such valuable property as slaves to pass under the residuary clause may be inferred from the doubting manner in which she mentions the existence of any residue. She gives "the rest and residue of her estate, if there be any."

If the testatrix had owned the two slaves Harriet and Manza, and no more, and had bequeathed two slaves, misnaming them, it could hardly be doubted that the legatee would take Harriet and Manza. Yet that would not differ from the present case in principle, and should not differ in result.

Thus the construction would stand, if the codicil had formed a clause in the will originally.

But the execution of a codicil is a republication of a will; and both papers must generally be construed *in pari materia*, as if they formed but one instrument, uttered *uno flatu*. A testament, with all its codicils, represents the wishes of the testator concerning the disposition of his property after his death; and however numerous may be its parts, it is to be construed as one declaration of intention, uttered at the death of testator.

It is at this point we dissent from the circuit decree. We do not assail the general doctrines of the decree concerning the admissibility of parol evidence to vary a written instrument; but we suppose the chancellor has overlooked the proposition

that the will and codicil are to be construed as one entire instrument. His attention seems not to have been directed to this point on the circuit; even in the learned argument here the point was barely suggested.

It may be objected that the will as it really stood originally, independent of the codicil, must, upon just reasoning, mean the same thing after the codicil as it meant before; and if it could not have been construed to refer to Harriet and Manza at the date of its execution, its meaning could not be changed by matter subsequently arising. The objection is more specious than solid. It is competent for a testator, by subsequent testamentary disposition, to declare his intention in matters previously dubious; or to interpret a prior disposition where it is not dubious; or even to declare his meaning in opposition to the plain import of the terms previously employed. All his testamentary dispositions make one testament.

It is ordered and decreed that the circuit decree be reversed in the particular above mentioned; and it is declared and adjudged that the plaintiff is entitled to the slaves Harriet and Manza. Defendant must account for the hire of these slaves, if any accrued. Costs to be paid from the estate of testatrix.

O'NEALL, EVANS, WARDLAW, FROST, WITHERS, and WHITNER, JJ., and JOHNSTON, DUNKIN, and DARGAN, Chancellors, concurred.

Decree reversed.

EVIDENCE TO CORRECT OR EXPLAIN WILL, WHEN ADMISSIBLE: See *Barnes v. Simms*, 49 Am. Dec. 435; *Brownfield v. Brownfield*, 51 Id. 590, and notes thereto. In the first of these cases it was held that where a testator made a specific bequest of negroes, and described two of them as "Aaron" and "Pike," but had no negroes of that name, parol evidence was inadmissible to prove that the testator meant two slaves by the names of "Lamon" and "Pite," and that the other names were inserted by mistake.

MOFFATT v. THOMSON.

[*5 RICHARDSON'S EQUITY*, 155.]

SURVIVING PARTNER CAN NOT SET OFF PRIVATE DEBT DUE HIM BY DECEASED COPARTNER against his share of assets collected since the dissolution of the copartnership; the effect of such set-off would be to give a preference among creditors of equal degree, which is in opposition to the South Carolina act of 1789.

PARTNER'S SHARE OF PARTNERSHIP STOCK AND EFFECTS IS ASSETS, AND GOES TO HIS REPRESENTATIVES, subject to the partnership debts, upon his decease; but the surviving partner is authorized to take and hold as

survivor for the purpose of administration, until the effects are reduced to money and the debts are paid; after which he is bound to pay over to the legal representatives of the deceased the latter's just share of the partnership funds.

PARTNER'S LIEN IS LIMITED TO ADVANCES FOR PARTNERSHIP PURPOSES,
and does not exist for a private debt due by a copartner.

BILL for an account of partnership assets, filed by the administrator of one Bowers against the defendant as surviving partner of the firm of Thomson & Bowers, attorneys and solicitors. Bowers was indebted to Thomson for board, chamber, washing, etc., by a contract independent of the partnership agreement; but Bowers' share of partnership funds collected by Thomson after the former's death was nearly sufficient to pay the demand, and Thomson claimed a right to retain for the debt. Bowers' estate was insufficient to pay his debts in full, and the administrator insisted that Thomson was entitled to retain for his debt ratably with the other creditors, and no more. The commissioner sustained this view, and on exceptions to his report, the circuit chancellor held that for all sums received by the defendant as survivor he must account to the administrator, and as to these, his equity, after the settlement of the partnership debts, if any, was not superior to that of any other individual creditor of Bowers; but that the defendant was entitled to set off his debt against any liability he incurred from receiving the money of the intestate in his life-time, and the commissioner was ordered to amend his report accordingly. The case again came up on the report of the commissioner, but the report was overruled, and ordered to become a decree of the court. The defendant appealed from both decrees.

Jeter, for the appellant.

Dawkins, contra.

By Court, DUNKIN, Chancellor. The ground of appeal involves the inquiry whether the surviving copartner can set off a private debt due to him by his deceased partner, against his share of assets collected since the dissolution of the copartnership. The chancellor has directed that for any balance due the deceased at the dissolution, the survivor is entitled to discount; but that the rights of the parties were fixed at the death of the intestate, and can not be varied by subsequent transactions. This general principle has been repeatedly recognized, and can scarcely be regarded as open for discussion. In the recent case of *Morton v. Caldwell*, 3 Stroh. Eq. 161, the court, in commenting upon the statute of 1789, remark, that "while this statute abolishes

preferences among creditors of equal rank, and virtually entitles each creditor, in case of deficient assets, to a claim on the estate of the deceased debtor, proportioned to his demand, it does not in terms, settle any point of time, in reference to which the respective demands must be examined, in order to determine the relative proportion of assets liable to their payment." "But that still it is a fundamental idea in the statute—a disregard of which must render its due administration intolerably perplexing if not impracticable—that the juncture, for the purpose of such a calculation, is the death of the debtor. It is then the remedy of the creditor ceases as to the person, and is restricted to the effects of the party indebted." So far is the principle carried, that if a creditor afterwards receives fifty per cent of his debt from a third party, he is entitled to recover the balance from the assets of the intestate, according to the proportion assigned to his original debt. On the other hand, the amount of assets for distribution can not be diminished by any subsequent arrangement or management of an unsatisfied creditor. Thus in *Happoldt v. Jones*, Harp. 109, a debtor of the intestate attempted to set off a note of the intestate to a third person, which had been transferred to the defendant since the intestate's decease. The court say, "the act expressly provides that no preference shall be given to creditors in equal degree. The debt due by the defendant was assets. The effect of allowing the whole amount of the discount is the payment of the entire demand, in exclusion of others, and is in direct opposition to the provisions of the act."

At the death of the intestate Bowers, he was indebted, individually, to the defendant Thomson, individually, in a certain amount. For the balance, as it thus stood, the defendant was entitled to his proportion of the assets of the intestate. But in the course of the administration it appeared that, subsequent to the death of the intestate, funds of the copartnership of Thomson & Bowers had been collected, after the dissolution, by the surviving copartner. The position assumed is, that Thomson is entitled to appropriate the share of the intestate in these funds to the extinguishment, in full, of the debt due by the intestate, individually, to the defendant, individually. If the intestate's proportion of this fund constituted assets, the position is untenable, unless the defendant's condition, as surviving partner, gave him a preference over the other individual creditors of the intestate. Both will be considered. The principle is as old, at least, as the time of Lord Coke, that copartners constitute an exception to the rule as to the *jus accrescendi*

- amongst joint tenants: Co. Lit. 182 a. Though they are joint tenants of all the partnership stock during their lives, there is no survivorship either at law or in equity: Story on Part., sec. 90. It follows that, upon the decease of one of several partners, his share of the stock and effects of the partnership, subject to the partnership debts, devolves to his personal representatives, who thereupon become, both at law and in equity, tenants in common with the surviving partner. Such is the doctrine of Kent, of Story, and indeed of every elementary writer on the subject. But as on the decease of one of the partners the surviving partner stands chargeable with the whole of the partnership debts, he is authorized to take and hold as survivor, for the purpose of administering the copartnership estate, until the effects are reduced to money and the debts are paid. When this is done, the surviving partner shall be held to account with the representatives of the deceased for his just share of the partnership funds: Collyer on Part., sec. 129. It is very difficult to make these principles more clear. On the death of one of the partners, his share in the concern constitutes assets, subject only to the charge of copartnership debts. No other debt, except a debt due by the copartnership, has any preference in relation to the share of the intestate in these funds. The lien which a partner has is equally well settled and distinctly limited. Each has a specific lien on the partnership stock and effects for moneys advanced by him for the use of the copartnership, beyond his proportion, and for moneys abstracted by his copartner from the copartnership funds, beyond the amount of his share. Indeed, as declared by Lord Hardwicke, nothing can be considered as the share of the partner but his proportion of the residue, after an account has been taken of what has been paid or advanced by each partner in the partnership transactions. The result is, that, according to the acknowledged principles, upon the dissolution of a copartnership by the death of one of the partners, the survivor has, as such, no rights, either in law or in equity, except for the collection of copartnership assets and the payment of copartnership debts. That done, he is bound to pay to the representative of the deceased partner his share of the fund, which is liable for distribution among his creditors upon the principles prescribed by law. The partners are declared to have no specific lien except for the purpose of securing or reimbursing themselves for advances made on account of the copartnership. The survivor has no other lien over the share of his deceased partner.

It is not pretended that the debt of the intestate was due to the firm or copartnership. It was an individual transaction with the defendant. Assuming that the other copartnership affairs were closed prior to the intestate's death, the case may be thus simplified: Suppose that, on the decease of the intestate, insolvent, he owed the defendant a private debt of one hundred and fifty dollars, and that in his possession the administrator found a note due to the copartnership, by a third person, of five hundred dollars. As he was bound by law to do, the administrator delivers this note to the defendant, the surviving partner, who collects the money, and then insists on retaining one hundred and fifty dollars from the share of the intestate, in payment of the private debt due to him. If there be any reliance on the principles stated, the administrator had an equal right with the defendant, both in law and equity, to this fund. For convenience, as well as for other reasons before stated, the surviving partner is authorized to collect the note. That done, and the debts due by the copartnership paid, he is bound, in the language of the authorities, to pay over to the legal representative of the deceased his just share of the partnership funds. He has no lien upon it for his private debt. His lien, by the authorities, is limited to advances for copartnership purposes. Upon what principle, then, or upon what authority, can he claim to appropriate the share of the intestate to the extinguishment of his private debt, and thus obtain a preference over other private creditors, and disturb the due course of administration? The authorities, from Lord Coke down, declare that the surviving copartner and the representative of the deceased partner are to be regarded as tenants in common of the copartnership effects. If there were three negroes belonging to the firm, and the debts paid, could the defendant resist the claim of the administrator for partition on account of a private demand which he had against the intestate? Or, if there were a sale for partition, would his open account exclude the specialty creditors of the intestate? It is believed that no tenant in common, although in exclusive possession of the common property, has ever been sustained in such a pretension. Upon the whole, the court is of opinion that the judgment of the chancellor is sustained by established principles, and the appeal is dismissed.

DARGAN and WARDLAW, Chancellors, concurred.

Appeal dismissed.

RIGHTS OF PARTNERSHIP AND SEPARATE CREDITORS IN DECEASED PARTNER'S ESTATE: See *Emanuel v. Bird*, 54 Am. Dec. 200, and note, where other cases are collected.

INTEREST OF DECEASED PARTNER'S REPRESENTATIVES IN PARTNERSHIP EFFECTS: See *Egberts v. Wood*, 24 Am. Dec. 236; *Dyer v. Clark*, 39 Id. 697; *Kinsler v. McCants*, 53 Id. 711; *Wilson v. Soper*, 56 Id. 573.

SURVIVING PARTNER'S RIGHTS AS TO ADMINISTRATION OF PARTNERSHIP EFFECTS: See *Wilder v. Keeler*, 23 Am. Dec. 781; *Egberts v. Wood*, 24 Id. 236; *Jones v. Hardesty*, 32 Id. 180; *Dyer v. Clark*, 39 Id. 697; *Pearson v. Keedy*, 43 Id. 160; *Kinsler v. McCants*, 53 Id. 711; *Andrew's Heirs v. Brown*, 56 Id. 252; *Wilson v. Soper*, Id. 573. The principal case was cited in *Wiessfeld v. Byrd*, 17 S. C. 114, to the point that a surviving partner is entitled to take and hold as survivor for the purpose of administering the copartnership estate, and it is further quoted to this effect.

PARTNER'S LIEN, WHEN EXISTS: See *Sumner v. Hampshire*, 32 Am. Dec. 722; *Engles v. Engles*, 38 Id. 37; *Pearson v. Keedy*, 43 Id. 160; *Smith v. Edwards*, 46 Id. 71; *Buchan v. Sumner*, 47 Id. 305; *Bardwell v. Perry*, Id. 687; *Allen v. Center Valley Co.*, 54 Id. 333; and see *Wilson v. Soper*, 56 Id. 573.

CASES AT LAW
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

STATE v. LINDENTHALL.

[5 RICHARDSON'S LAW, 237.]

LARCENY IS COMMITTED BY ONE OBTAINING Possession of Goods WITH OWNER's CONSENT, under pretense of taking them to another to examine with a view to purchasing, but with a real intent to steal them, and afterwards converting them to his own use by pawning or otherwise.

INDICTMENT for larceny of certain jewelry. The evidence was that the prisoner called at a jewelry store after a previous introduction, and asked to look at some jewelry, saying that he wished to make a present to a lady. Several articles having been shown him, he asked permission to take them to the lady to choose from, saying he would return in half an hour and pay for those selected. The clerk in attendance let him have them. He did not return, but pawned one of the articles, and was attempting to leave the city with the residue, when he was arrested. The judge charged the jury that obtaining possession of goods under a contract of sale, but with a fraudulent intent not to pay, was not larceny; that the owner's want of consent to the possession was an essential ingredient in the offense; but if the possession was obtained by false representations with intent to convert them, the owner not intending to part with his right of property, it was larceny. Verdict, guilty. Appeal and motion for a new trial by the defendant, because there was no sufficient evidence of a felonious intent, or that the owner's consent was wanting, and because of error in the judge's charge.

Davega and Buist, for the appellant.

Hayne, attorney general, contra.

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By Court, O'NEALL, J. Notwithstanding the ingenious views presented by the attorneys for the prisoner, we think he was properly convicted.

The guilt of one accused of larceny depends upon intention. If such a one obtain the possession of goods by the consent of the owner for one purpose, such as hiring or carrying, with intent to steal, and consummates that intention partially or entirely, by converting the goods to his own use, he is beyond doubt guilty of larceny. This is abundantly shown by *State v. Gorman*, 2 Nott & M. 90 [10 Am. Dec. 576]; *State v. Thurston*, 2 McMull. 382.

In this case the facts very clearly show that the defendant possessed himself of the goods under a pretense to buy, when in fact he intended to steal. In such a case there is no possibility of the prisoner sheltering himself under a possession obtained by consent.

The motion is dismissed.

EVANS, WARDLAW, FROST, WITHERS, and WHITNER, JJ., concurred.

Motion dismissed.

LARCENY, WHAT CONSTITUTES, IN GENERAL: See for an extended discussion of this subject the note to *State v. Homes*, *ante*, p. 271. As to when one is to be deemed guilty of larceny who obtains the manual possession of goods with the owner's consent, and subsequently appropriates them to his own use, see *People v. Call*, 43 Id. 655, and cases cited in the note thereto. See also *State v. Gorman*, 10 Id. 576.

FERGUSON v. WITSELL.

[5 RICHARDSON'S LAW, 280.]

ACTUAL POSSESSION OF LAND IS SUFFICIENT TO MAINTAIN ACTION FOR DISTURBING EASEMENT appurtenant thereto, and if seisin and possession are alleged, but possession only is proved, it is enough.

SEISIN AND POSSESSION DO NOT MEAN SAME THING; seisin is the possession of a freehold estate, created at common law by livery of seisin.

EASEMENT APPURTENANT IS GENERALLY EXTINGUISHED BY UNITY OF TITLE in the dominant and servient estates in the same person; not so where it is essential to the enjoyment of the estate, as in case of an easement of drainage, unless, while the estates are united, the easement is actually severed.

CASE for obstructing a certain canal partly on the plaintiff's and partly on the defendant's land, immemorially used by the plaintiff and those under whom he claims, the declaration alleg-

ing that the plaintiff was seised and possessed of his land. It appeared that the plaintiff's and defendant's lands in question constituted portions of a certain rice swamp, the defendant's land being below that of the plaintiff, and that the canal had been used for more than fifty years for the drainage of the plaintiff's land. The plaintiff proved actual possession of his land, but failed to prove title. It also appeared that about 1843, and for several years thereafter, one S. W. Leith, under whom the defendant purchased, was the owner of both tracts. The jury were instructed that this, being a necessary easement appurtenant to the plaintiff's land, was not extinguished by unity of title. Verdict for the plaintiff. Appeal and motions for a nonsuit, and also for a new trial by the defendant, on the grounds that the plaintiff had not proved seisin or ownership, and that the easement, if any, had been extinguished.

Henderson, for the appellant.

Carn, contra.

By Court, Evans, J. There is no doubt that one proving the actual possession of land to which an easement is attached may have an action for disturbing him in the enjoyment of it. And it is not denied that this plaintiff was under no obligation to set out the *quantum* of interest which he had in the land. Possession was all that was necessary to be alleged or proved. It has been argued that seisin means the same as possession, but I do not find this to be so. It does mean possession, but it is a possession of a freehold estate, such as by the common law is created by livery of seisin. The facts stated in the declaration must be such as to give the plaintiff a cause for action, but it is not contended if he sets out more than this, he is bound to prove it, and if he does not, there is a variance between the allegation and the proof. The rule from some of the cases would seem to be this, that if two facts are stated, and one of them is sufficient, it is not imperative on the plaintiff to prove both. *Bromfield v. Jones*, 4 Barn. & Cress. 380; S. C., 10 Eng. Com. L. 624, was an action for the escape of one committed on execution. The declaration set out that the plaintiff at Easter term, 5 Geo. IV., in king's bench, recovered against one H. W. seventy-nine pounds, as appeared by the record, and that at Trinity term of the same year such proceedings were had as that the plaintiff was entitled to his execution for his damages, etc.; whereupon the said H. W. was committed to the custody of the defendant, who suffered him to escape. On the trial the plaintiff gave in

evidence his original judgment, but gave no evidence of the *scire facias*, and his proof was held to be sufficient. He had proved enough to maintain his action, and was not bound to prove the proceedings or the *scire facias*, although he had set them out in his declaration. But there is a confusion in the cases on this subject, and I am unable to lay down any clear and intelligible rule whereby to determine when a plaintiff is bound to prove an unnecessary averment. It is certain that some immaterial averments may be struck out as surplusage, and it is equally true that if there be a traverse of an immaterial averment, and issue be taken on it, it must be proved. But whether the general traverse of the plea of not guilty imposes the proof on the party making the averment, is not so very certain. I would rather infer from what is said in 1 Ch. Pl. 229, and *Goram v. Sweeting*, 2 Saund. 206, that the issue shall be made by a special traverse. But we meet this case on a different ground. Possession is presumptive evidence of title, not of any particular title, but of such as is necessary to maintain the action. When, therefore, it was proved that the plaintiff, Ferguson, was in possession, the law from this presumes he was the owner of the land, unless the contrary be proved. I think, therefore, the defendant can take nothing by his motion for a nonsuit.

It is not denied that Gibbes had a prescriptive right of drainage through the canal which the defendant has obstructed, but it is contended that because the title to both estates was united in S. W. Leith this operated as an extinguishment of the easement. It is true that unity of title will in general have that effect. But where the easement is essential to the enjoyment of the land, and the estate can not be enjoyed without it, the easement of necessity is appurtenant to the estate, and will pass with it to the purchaser: *Nicholas v. Chamberlain*, Cro. Jac. 121. A man erected a house on a part of his land, and built a conduit on another part, and laid pipes to conduct the water to the house. He afterwards sold the house, and it was held that the use of the conduit was appurtenant to the house, and passed by the sale to the purchaser. According to this case, if Leith, whilst he was the owner of both tenements, had dug the canal for the purpose of draining the plaintiff's land, and had afterwards sold the land, the right to use the canal would go with the land.

It can make no difference that the canal was there before Leith purchased, or that the commissioner in equity and not

Leith sold the land. When he became the owner of both tenements, it was competent for him to have severed the easement from the tenement, and if he had done so, I suppose the doctrine would apply that an easement once severed was extinguished forever. But he used the canal for the purposes to which it had been originally devoted, and in that condition it was sold as a part of his estate. We are of opinion, therefore, that the plaintiff, who is presumptively the legal owner of the estate, is entitled to the use of the canal; and to retain his verdict against the defendant for obstructing it.

The motion is dismissed.

O'NEALL, WARDLAW, FROST, WITHERS, and WHITMER, JJ., concurred.

Motions dismissed.

ACTUAL POSSESSION OF LAND IS SUFFICIENT TO MAINTAIN CASE FOR OBSTRUCTING EASEMENT, and proof of such possession is sufficient, though seisin is alleged: *Pearce v. McClenaghan*, 55 Am. Dec. 710.

EXTINCTION OF EASEMENT BY UNITY OF TITLE in dominant and servient estates: See *Ritger v. Parker*, 54 Am. Dec. 744, and note; *Pearce v. McClenaghan*, 55 Id. 710.

CAMERON v. RICH.

(*6 RICHARDSON'S LAW, 382.*)

LOG-BOOK KEPT BY DECEASED MATE IS NOT COMPETENT EVIDENCE for the master of a vessel in an action against him for an injury to goods carried by him, to prove the occurrence of storms on the voyage.

PROTEST BY MASTER AND CREW OF VESSEL IS INADMISSIBLE EVIDENCE in favor of the master in an action against him for an injury to goods carried by him.

GENERAL RULE AS TO ADMISSIBILITY OF WRITTEN ENTRIES AND DECLARATIONS in evidence, stated per O'Neal, J.

BURDEN IS ON CARRIER TO SHOW INJURY AROSE FROM STRESS OF WEATHER in an action against him for injury to goods where the bill of lading excepts "dangers of the sea."

Action for injuries by sea-water to goods carried by the defendant, as master of a certain vessel, under a bill of lading excepting "dangers of the sea." To prove the occurrence of storms during the voyage, occasioning the injury, the defendant offered in evidence the log-book kept by the mate, who had since died, and also a protest by the master, mate, and crew. Both were rejected. The instructions need not be stated.

Verdict for the plaintiff. Appeal and motion for a new trial by the defendant: 1. Because of the rejection of the log-book. 2. Because of the rejection of the protest. 3. Because the evidence showed that the vessel was seaworthy when she sailed, and that she had encountered a severe storm on the voyage, and the loss was therefore attributable to dangers of the sea. 4. Because the verdict was arbitrary and against the weight of evidence.

J. M. Walker and Hunt, for the motion.

Dukes, contra.

By Court, O'NEALL, J. The first ground supposes that the log-book of the ship *Martha* was competent evidence. I do not perceive how it can be very well distinguished from the exclusion of the protest, which, according to *Cudworth v. The South Carolina Insurance Co.*, 4 Rich. L. 416 [55 Am. Dec. 692], is incompetent evidence.

It has, however, been supposed, that the log-book, as memoranda of daily transactions, may be likened to shop-keepers' books; and, in that respect, might be evidence, when it was shown that the mate, a person making the entries, was dead or removed. It is very clear that the rule of admitting entries, analogous to shop-keepers' books, has been of late constantly narrowed. This would be an extension to an entire new class of cases, and can not be allowed.

The case of *O'Neale v. Walton*, 1 Rich. L. 234, can not help the defendant in this respect. For that case does not make a memorandum made by a witness, at the time of a transaction, evidence of the facts then set down: it only allows the witness to refer to it to refresh his memory. So here, if the mate had been on the stand, he might have referred to the log-book to refresh his memory.

The rule as to the admissibility of entries or declarations made by third persons underwent the examination of the court of appeals in *Gilchrist v. Martin*, Bail. Eq. 492. From the opinion which I delivered in that case, in 1831, I extract the following, page 503, as an exposition of the rule, and which will show that the log-book could not be received as an entry or declaration:

"From this view of the cases, I come to the conclusion that, before an entry or declaration can be received in any case, it must appear—1. To have been made without any intent to

falsify the fact; 2. In cases other than those depending on hearsay, such as pedigree, custom, boundary, and perhaps prescription, that it was made against the interest of the party in the subject-matter of the entry or declaration; and 3. That the entry or declaration itself, unless where it is made by a tenant in possession, should be so ancient as to preclude all suspicion that it was manufactured for the occasion. And the cases in which entries or declarations are generally admissible, are—1. In aid of or to repel a legal presumption from lapse of time; 2. To give character to an ancient possession, or to make out an ancient title; 3. To corroborate or to repel a conclusion arising from other testimony as to a long past event or fact; and 4. To give character to an actual recent possession, and thereby show a right of property in a third person."

The second ground is disposed of, as has been already intimated, by *Cudworth v. The South Carolina Insurance Company*, 4 Rich. L. 416 [55 Am. Dec. 692].

The third ground is one of fact, and the court sees no reason to suppose that the verdict was wrong. The former decision, *Cameron v. Rich*, 4 Stroh. L. 168 [53 Am. Dec. 670], held very properly that the carrier must show that the injury which the plaintiff's goods received arose from stress of weather. That there was testimony from which such a conclusion might have been drawn is true; but it is equally true, that there was equally as much, if not more, that the injury arose from water exuding through the deck, on which the salt was stored.

The motion is dismissed.

EVANS, WARDLAW, and FROST, JJ., concurred.

WHITNER, J., absent.

Motion dismissed.

MARINE PROTEST AS EVIDENCE: See *Cudworth v. South Carolina Ins. Co.*, 55 Am. Dec. 692, and cases collected in the note thereto.

BURDEN IS ON CARRIER, AFTER PROOF OF LOSS OR DAMAGE of goods which he has undertaken to carry, to show that it arose from a cause for which he was not responsible: *Cameron v. Rich*, 53 Am. Dec. 670, and note collecting prior cases in this series; *Camden etc. R. R. Co. v. Baldawf*, 55 Id. 481; *Leonard v. Hendrickson*, Id. 587.

ELLIOTT v. RHETT.

[5 RICHARDSON'S LAW, 405.]

GRANT OF CONTINUOUS AND APPARENT EASEMENTS IS IMPLIED ON SEVERANCE OF HERITAGE where, though having no legal existence as easements, they have in fact been used by the owner during the unity of the heritage, or where they are necessary to the full enjoyment of the several portions of the heritage.

GRANT OF RIGHT OF DRAINAGE IS IMPLIED ON SEVERANCE OF HERITAGE by a conveyance of part, in favor of the part conveyed, as against the residue, where such right has been continuously exercised by the owner of the entire tract, and there is no natural drainage.

ABANDONMENT OF SCHEME OF CULTIVATION WHICH WILL DESTROY EASEMENT or right of drainage in favor of one part of an entire tract owned by a common owner, as against the residue, where the former part is conveyed to another person, must be permanent; an accidental and temporary breaking of a dam constituting part of a system of drainage is not sufficient.

APPEALS MUST GENERALLY DEPEND ON QUESTIONS SUBMITTED TO COURT BELOW, and no new ground can be taken in the appellate court; but this is a rule for the parties and counsel, and the appellate court may, in order to do justice, assume any new ground having an important bearing on the merits, if full opportunity for explanation and argument is given.

ARTIFICIAL EASEMENT OF DRAINAGE CREATED BY OWNER OF ENTIRE TRACT in favor of one part against another is entitled to the same consideration as if it existed by nature.

ARTIFICIAL EASEMENT SUBSTITUTED FOR NATURAL RIGHT of property is entitled to more favorable regard than one which is a restriction upon a natural right.

REQUEST TO REMOVE DISTURBANCE OF EASEMENT IS ESSENTIAL before bringing an action against one who was not the creator of the disturbance.

PLAINTIFF MUST REMOVE OBSTRUCTIONS TO ENJOYMENT OF EASEMENT existing on his own land, or show his readiness to do so, before he can maintain an action against another for disturbing such easement.

RIGHT TO EASEMENT MAY BE LOST BY ENCROACHMENT, in many cases.

WHERE USURPED AND RIGHTFUL EASEMENT ARE BLENDED by the person entitled to the rightful easement, he can not complain of an obstruction of both unless he can show that the usurped easement might have been obstructed without disturbance of the rightful one.

CASE for obstruction of an easement. The facts appear from the opinion. The court instructed the jury, in substance, that in a swamp the owner of the upper part had a right to vent through accustomed channels over the lower part, and if the natural vents were obstructed by the lower proprietor, he must substitute artificial vents equally as good, and that the upper proprietor could be deprived of his easement of drainage over the lands below only by express agreement or adverse user for twenty years; that in the present case, if those through whom

the plaintiff claimed were accustomed, when the three plantations were united, to vent through Clark's dam over the tract called Smilie, and sold said tract, the purchaser thereof took subject to the easement; that if, at the time of sale, the vent had been so long disused as to afford presumption of an abandonment, the easement was extinguished; that if the former owners for more than twenty years had used Clark's dam to back the water from the tract called Smilie at the time of sale, the purchaser of that tract took free of the easement; that disuse alone without adverse possession would not extinguish such an easement, whether the land was cleared or uncleared; otherwise if the disuse were attended by circumstances showing an abandonment. Verdict for the defendant. Appeal and motion for a new trial by the plaintiff, on the following grounds: 1. Because the evidence showed that the privilege of draining over the defendant's land, the Smilie tract, was annexed to the plaintiff's land, the Middle Place, at the time of the sale of the Smilie tract, and had never been permanently obstructed or abandoned. 2. Because mere non-user of an easement, even for twenty years, will not raise a presumption of abandonment. 3. Because neglect to use the canals above and below Clark's dam during the unity of ownership was no evidence of ownership, and because it appeared that at the time of the sale of the Smilie tract, and until 1835, the water flowed and continued to flow through Clark's dam over said tract from Middle Place. 4. That the right to vent through the Middle Place canals into the Smilie tract was a subsisting privilege, and had not been extinguished by the assertion of any adverse right a sufficient time before action brought. 5. Because his honor should have charged that if they believed that the vent for the waters in the land below Clark's dam was over the defendant's land, they should find for the plaintiff as to the obstructions erected and continued before and after the plaintiff's request and the order of the freeholders to remove them. 6. Because the verdict was against law.

Treville, for the appellant.

Rhett and Hayne, contra.

By Court, WARDLAW, J. A few prominent facts, gathered from the report and admissions made at the bar, will present the case which is to be decided.

The swamp upon which the plantations of plaintiff and defendant are situated had, by nature, no drainage sufficient for

cultivation. Its surplus waters were slowly discharged toward the north-west, by sluggish currents on either side of Mickie island, into Deer creek, and thence into Ashepoo river. The general surface was so nearly level that canals and ditches, dug below the surface, so as to collect and carry off the waters, might without much difficulty be so graded as to run in any desired course if a sufficient outlet for them into the creek or river could be had.

In 1767, the date of the oldest plat that was produced on the trial, the three plantations (viz., the Bluff and Middle Place, now belonging to the plaintiff, and Smilie, now belonging to the defendant) belonged to one person, and were all, in part or in whole, cleared, ditched, banked, and cultivated in rice. The waters of the Bluff (which, of the three, was southernmost and highest up the swamp) were by Boone's causeway (which is situated on the line across the swamp between the Bluff and Middle Place) obstructed in their natural flow over Middle Place and turned into Boone's canal, which ran near the western edge of the swamp, through Middle Place, and west of Mickie island to Deer creek. The waters of Middle Place were dammed back from Smilie by Clark's dam (which extended from Mickie island on the west across the western branch of the swamp to the high land on the east), and were turned by ditches or a canal into Boone's canal. The natural flow of the waters north of Clark's dam (round the east and north of Mickie island to Deer creek) was obstructed by Toomer's bank, which had been raised on the adjoining land of Fishburne or Ladson, and an artificial channel, cut partly through land higher than any of the swamp, afforded a vent for these waters into Ashepoo, in a north-eastern direction, so that they were discharged far below the mouth of Deer creek. Clark's dam was a short distance south of the line that divided the Smilie tract and the Middle Place tract; and some acres of swamp, which originally belonged to the latter tract (spoken of as seven or fifteen acres) were by the dam separated from Middle Place and connected with Smilie; and these few acres, as well as all of Smilie, depended for drainage upon the artificial channel which ran near the eastern edge of the swamp up to Clark's dam, but not through it.

In this condition the three plantations seem to have been cultivated by successive owners of the whole, from 1767 until a period shortly before 1832.

In 1830 the cultivation of some of the lands was neglected, an accidental break in Clark's dam, which had taken place after

1826, was left unrepaired, and the waters from Middle Place flowed into Smilie. In 1832 the Smilie tract, according to its original lines, was sold to George P. Elliott, by persons who retained the other two tracts, until they sold them to the plaintiff in 1847 and 1849. The same year George P. Elliott purchased, he made a dam to obstruct the flow of the waters, which came through the break in Clark's dam; and he continued to make improvements and obstructions, until in 1835 he had made three dams across the swamp on his own land, and had repaired Clark's dam on the land above, and had filled up the artificial channel between his line and Clark's dam. In 1849 the defendant was the owner of Smilie by purchase from George P. Elliott's vendee, and was continuing the obstructions on his own land, and using the artificial channel before mentioned, which is now called the Smilie canal; the plaintiff, insisting upon his right to discharge the waters of Middle Place through Clark's dam into the Smilie canal, or upon the Smilie tract, procured the defendant's bank to be cut by a magistrate and freeholders, and brought this action to recover damages for the obstruction.

If no break had ever occurred in Clark's dam, there would have been no circumstance which could have suggested a different rule, for the rights of the parties, from the disposition or arrangements which had been made for the use of the plantations by the proprietors, who owned them all. Apart from all consideration of time, there is implied, upon the severance of a heritage, a grant of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements, as well as of all those necessary easements without which the enjoyment of the several portions could not be fully had: Gale & What. on Easem. 49.

To no subject is this doctrine more applicable than to the rice plantations on our inland swamps, in which the natural flow of water must be aided and controlled by artificial contrivances, and these may be infinitely diversified according to the judgment and ability of the owner. Those benefits or inconveniences which, according to the scheme of culture that was adopted by the owner of a whole body of land, were enjoyed or suffered by a parcel thereof that he has sold, provided they are of unintermitting character and are shown by external works, pass with the parcel as ^{necessary} incidents of the land. They are like the natural easements of running water and sup-

porting soil. Indeed, on a rice plantation, the ditches and banks are real substitutes for the insufficient arrangements of nature, the marks of which are often entirely obliterated.

If Clark's dam had been in repair when George P. Elliott bought Smilie, there could then be no doubt that he and those who derive title from him might not only, by banks and dams, resist the discharge upon Smilie of the waters from Middle Place, which had been long dammed back by Clark's dam and turned into another channel, but might insist that Clark's dam should be in all respects regarded as a natural bank, which the owner of Middle Place could not rightfully cut or alter to their damage.

But Clark's dam was broken when George P. Elliott purchased—the water might then be seen to descend through it from Middle Place to Smilie according to the law of nature; and was not Smilie, when bought, subject to the natural easement which this law imposed? This depends upon the manifestations of the will of the owner of the two tenements. The arrangements which he had made he could change at pleasure; and if he had, before the sale of Smilie, shown that his scheme was changed, and that he no longer intended Clark's dam to remain as an obstruction to the natural flow of the waters, then his last disposition furnished the rule according to which the purchaser should take Smilie, burdened or benefited by the qualities which were attached to it. But a change which is to impress lasting qualities on an estate must be permanent and not temporary. There must be an abandonment of the old scheme, and either the adoption of a new one or an acquiescence in the natural order of things that may follow the abandonment: *Luttrell's Case*, 4 Co. 86. Upon this point, the verdict of the jury, under the instructions which were given, shows conclusively that there was no abandonment of the scheme of culture which had been long persisted in, but only an accidental and temporary derangement of it, no more indicating a change of purpose than any decay of materials or occasional disuse of an improvement would do. To this conclusion the conduct of George P. Elliott, in repairing Clark's dam, the acquiescence of those under whom the plaintiff claims from 1835 till 1849, in obstructions of the right now urged to discharge through Clark's dam, and the evidence of the insufficiency of the Smilie canal, even in its present improved condition, to discharge more than the waters of Smilie, all plainly conduce: and besides the mere fact that there was a

break in Clark's dam when George P. Elliott purchased, we see nothing in the evidence to favor the view of the plaintiff.

What we have said decides the case which the plaintiff presented on the circuit, where, throughout the trial, he urged his right to drain Middle Place, through Clark's dam, into and upon Smilie. He now, under his fifth ground of appeal, presents a new case to this court, claiming a narrower right, if the other should be denied to him. It is this: He has, as before mentioned, a few acres below Clark's dam, between it and the Smilie boundary line. These, by the scheme of culture adopted by the owners of the two tenements, were connected with Smilie, and, like it, drained through the artificial channel now called the Smilie canal: the defendant has continued obstruction which George P. Elliott, between 1832 and 1835, made to this drainage; and for this, it is said, the plaintiff should recover, even if he has not a right to drain through Clark's dam.

The first count of the declaration complains of defendant's having obstructed the natural course of the waters from plaintiff's low ground through defendant's land to tide-water: under this the plaintiff's new case could not be made, for the natural course had been obstructed and was superseded by an artificial channel, at the time the heritage was severed, long before and ever since.

The third count is also inapplicable; for it complains of the defendant's neglecting to repair the artificial channel, as he was bound to do, and there is no evidence that the defendant was bound to repair the channel upon plaintiff's land, nor that the channel upon defendant's own land has been out of repair.

The second count complains that defendant has continued banks which had been wrongfully erected, and thereby has obstructed the plaintiff's right to drain the water from his land into a channel leading over the land of the defendant. This might serve either for the larger right to drain the waters above Clark's dam into the channel, or for the smaller right which the new case presents: and it is said for the plaintiff that this smaller right is shown by the evidence, and should be now sustained by the court, although it was not urged on the trial below.

The general rule is, that appeals must depend upon the question or point submitted to the court below, and that no new ground shall be taken in the court of appeals: *Ford v. Travis*, 2 Brev. 299. This is, however, a rule for parties and their counsel, not for the court. It is competent for the court to do justice by assuming any ground which it perceives to have an

important bearing on the merits of the case, taking care only that there shall be full opportunity afforded for explanation and argument: *Mitchell v. Anderson*, 1 Hill (S. C.), 69 [26 Am. Dec. 158]. When a case has been heard below and decided correctly according to the evidence that was there adduced, this court will not listen to an application for new trial on the suggestion that a ground not before taken may, if another opportunity be afforded, be sustained by evidence which was not offered before, although it might have been; but, in its discretion, this court may supply the inadvertent omissions of either judge or counsel, by deducing any result which will follow from a just application of the law to the evidence that was before the jury. If we could then see clearly that the plaintiff's new case ought to have come to a result different from that which was attained on the trial that involved it, a rehearing would be awarded.

The objection to the new case most urged by the defendant is, that (even if the right to drain through the Smilie canal the few acres of the Middle Place tract which lie below Clark's dam was established by the disposition of the owners of the two tenements) that right has been extinguished by the acquiescence of the owners of Middle Place in the obstructions which were made by George P. Elliott. It is said that these obstructions were permitted, and were incompatible with the continuance of the easement now claimed; that they amounted to such an alteration in the disposition of the dominant tenement as made it no longer capable of the perception of this easement, and that thus they established a new disposition which did not embrace the easement: *Liggins v. Inge*, 7 Bing. 682; *Gale & What. on Easem.* 354.

Upon this point it must be remarked that the natural condition of the few acres in question is not made clear by the evidence. They may have been higher than the Smilie Place, so that water from them naturally flowed over the Smilie Place, and would naturally flow into the Smilie canal; or they may (as is represented in Bacot's plat) have been in a basin lower than the lands above or below, so that by nature water was ponded on them, and only the surplus after great rains would now run toward the north. The ditches which once went from them to the Smilie canal may or may not have drained them.

The natural easement, if any existed, was once superseded by the disposition of the owner of the two tenements: the artificial easement which he created, whatever may have been its extent, existed at the time of the sale to George P. Elliott, and is in no

respect entitled to less consideration than if it existed by nature. A right to obstruct it, so far as practicable, might have been granted; but substituted as it was, for the natural right of property, it is entitled to more favorable regard than are those easements which are restrictions upon natural rights. It is clear that no mere non-user, independent of all change of disposition and of all obstruction, would have destroyed it, or could have done so, without substituting something else equally or more inconvenient to the defendant, which must naturally have followed from the necessity of some outlet for the water between Clark's dam and Smilie. Strong circumstances only could show an intention permanently to abandon it: and it is unnecessary for us to consider whether such intention should be inferred from anything short of that length of adverse enjoyment in obstruction of it, which would raise the presumption of a grant of an easement, or of a right to obstruct a natural incident of property. The acts of George P. Elliott, particularly his filling up the ditches between his land and Clark's dam, were in themselves very strong; but we can not venture to say that there was such evidence of the consent of the persons, under whom the plaintiff claims, to these acts, that from them, unconfirmed by twenty years' continuance, the jury must have found that the easement claimed by the plaintiff in his new case has been extinguished.

There are, however, other objections to the plaintiff's new case, which require no deductions from the evidence that the jury have not drawn.

Where a defendant was not the original creator of the disturbance of an easement, an action will not lie against him until he has been requested to remove the cause of the disturbance which is on his land: *Penruddock's Case*, 5 Co. 101; *Brent v. Haddon*, Cro. Jac. 555; and where obstructions to the plaintiff's enjoyment of an easement exist upon his own land, and without the removal of these, nothing that the defendant could be lawfully required to do would restore the enjoyment, the plaintiff must remove these obstructions, or show his readiness to do so, before he can require the defendant to do what would be of itself insufficient. In this case, the evidence shows that on the eastern edge of the plaintiff's low ground, below Clark's dam, the Smilie canal was, before 1832, continued up to Clark's dam, and that a diagonal ditch ran from a point on the Smilie canal, which point is near to the boundary line between the two tracts (Middle Place and Smilie), through this low ground up to the

western end of Clark's dam. At the junction of this ditch with the canal, a trunk was placed. George P. Elliott went upon the land, now owned by plaintiff, and removed the trunk, and filled up both ditch and canal above the boundary line. To drain in this ditch and canal, according to the condition they were in when the possession of both tenements was in one owner, is the right of the plaintiff, if he has any right to drain through defendant's land. No obligation is shown to have devolved upon defendant to remove the obstructions which were upon plaintiff's land. The plaintiff has, by nothing that he has done, evinced his desire to drain his few acres below Clark's dam, according to the former scheme of culture; but he caused the defendant's bank to be cut at a point west of the point where the canal, as it formerly was, would have cut this bank, thus showing an intention to drain according to some imagined natural right, and not according to the arrangement which had been made for the two tenements; and above all, he cut the bank when the vent through Clark's dam was open, thus evincing an intention to drain, not his few acres below the dam only, but the whole of his Middle Place. He thus added to an easement which he may have been entitled to a larger easement which the decision made on the circuit and hereinbefore approved by us, shows he had no right to. In many cases, the right to an easement is lost by encroachment: *Garrill v. Sharp*, 3 Ad. & El. 325; S. C., 4 Nev. & M. 834.

Without, however, deciding anything on that head, we can see that the obstructions continued by the defendant were necessary to guard him against the larger right which the plaintiff had undertaken to establish, and that the plaintiff has no right to complain of these obstructions as disturbances of a rightful easement, unless he can show that the usurped easement could have been obstructed without disturbance of the rightful one. He so blended the two in his attempt to enjoy them that the defendant could not separate, and might lawfully obstruct both, at any rate until the excess over the right was corrected: *Gale & What. on Easem.* 374. It thus appears that if the plaintiff had on circuit admitted what we find to have been correctly decided, that he had no right to drain through Clark's dam, and had there presented only the new case which he has here submitted, he ought, under the evidence which was adduced, to have been nonsuited.

The motion is therefore dismissed.

O'NEALL, EVANS, FROST, and WHITNER, JJ., concurred.

WITHERS, J. I concur in this opinion: but desire to observe that I would favor a new trial to the plaintiff, that he might litigate singly his "new case" (as it is termed), if I supposed that the record in this cause, the verdict, and this decision would operate to estop him from testing (if he should so desire) a right to drain, by natural flow or through artificial substitute (as the case may be), over the defendant's premises, so much of the plaintiff's Middle Place as is situate below Clark's dam.

Motion dismissed.

CONTINUANCE OF EASEMENTS ON SEVERANCE OF HERITAGE, AS BETWEEN PARTS THEREOF.—It is, of course, impossible for one to have an easement proper in his own land, inasmuch as his ownership swallows all inferior rights. But it is clear that the owner of an entire estate, or of two or more adjoining tenements, may impress upon one part of the estate, or upon one or more of the tenements, an apparent servitude in favor of the other parts or tenements, which partakes of all the qualities of a true easement, except that so long as the unity of ownership continues, it is, so to speak, a mere easement at will, terminable at the pleasure of the owner. The question proposed for discussion in this note is, as to whether or not such quasi easements remain and ripen into real easements, upon severance of the ownership by conveyance of the dominant or servient parts or tenements. This question depends for solution somewhat upon the nature of the apparent easement, and also, perhaps, upon the further question, whether or not it is the dominant or servient part or tenement that is alienated.

IMPLIED GRANT OF APPARENT AND CONTINUOUS EASEMENTS ON CONVEYING PART OF HERITAGE.—Upon a conveyance of part of an entire estate, or of one of two adjacent tenements, all apparent and continuous privileges or quasi easements over the remaining lands of the grantor, annexed to the part granted during the unity of ownership for the beneficial and comfortable enjoyment thereof, and in actual use by the grantor, or with his consent at the time of the grant, will pass by implication, without the word "appurtenances," or the like, in the conveyance: Washb. on Easem. 43, 44; Gale on Easem., 4th ed., 85; Goddard's Law of Easem., Bennett's ed., 119, 122; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Barnes v. Loach*, L. R., 4 Q. B. Div., 494; S. C., 48 L. J. Q. B. Div. 756; *Cave v. Crafts*, 53 Cal. 135; S. C., 6 Rep. 423; *Thompson v. Miner*, 30 Iowa, 386; *Henry v. Koch*, 80 Ky. 391; S. C., 44 Am. Rep. 484; S. C., 15 Rep. 268; *Fetters v. Humphreys*, 18 N. J. Eq. 260; S. C. affirmed, 19 Id. 471; *Denton v. Leddell*, 23 Id. 64; *Lampman v. Milks*, 21 N. Y. 505; *Parsons v. Johnson*, 68 Id. 62; S. C., 23 Am. Rep. 149; *Simmons v. Cloonan*, 81 N. Y. 557; *Kenyon v. Nichols*, 1 R. I. 411; certainly so, where such privileges or quasi easements are necessary for the reasonable and convenient enjoyment of the granted premises: Gale on Easem., 4th ed., 85; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Story v. Odin*, 7 Am. Dec. 50, note; *Morrison v. King*, 62 Ill. 30; *Mitchell v. Scipel*, 53 Md. 251; S. C., 36 Am. Rep. 404, and note; *Lanier v. Booth*, 50 Miss. 410; *Brakely v. Sharp*, 9 N. J. Eq. 9; S. C., 10 Id. 206; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Phillips v. Phillips*, 48 Id. 178; *Coolidge v. Hager*, 43 Vt. 9; *Dillman v. Hoffman*, 38 Wis. 559. But the point as to whether or not such privileges must be necessary to the enjoyment of the grant, in order to pass, will be further discussed in a subsequent section of this note.

A leading American case on this subject of implied grants of easements on conveyance of part of an estate or of one of two adjacent tenements is *Lampman v. Mills*, 21 N. Y. 505, in which Selden, J., thus states the doctrine: "The rule of the common law on this subject is well settled. The principle is that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes are created corresponding to the benefits and burdens mutually existing at the time of the sale."

This mode of creating easements between two tenements by a common owner of both making the enjoyment of one dependent in some measure upon some service or burden imposed upon the other, and then conveying the former tenement, is strictly analogous to the *destination du père de famille* of the French law, whereby an owner of several heritages may so arrange or dispose them that one will receive a benefit from another which will ripen into a servitude on severance: Washb. on Easem. 16; Gale on Easem., 4th ed., 86. In the Louisiana revised civil code, sec. 769, it is expressly provided, in accordance with the doctrine of the French law on this subject, that "if the owner of two estates between which there exists an apparent sign of servitude sell one of those estates, and if the deed of sale be silent respecting the servitude, the same shall continue to exist actively or passively in favor of or upon the estate which has been sold."

The reason upon which this doctrine of an implied grant of apparent and continuous easements on conveyance of one of two tenements or parts of an estate is said to be found in the maxim that when a thing is granted everything necessary to the enjoyment thereof, which is in the grantor's gift, is also presumed to be granted: *Liford's Case*, 11 Rep. 52; *Pomfret v. Ricrost*, 1 Saund. 321; and in the kindred maxim that "no man can derogate from his own grant:" Washb. on Easem. 31; Gale on Easem., 4th ed., 87. This latter maxim is merely the formulation of a principle of the law of estoppel. Certain it is that where the owner of two tenements or parts of an estate so arranges them with respect to each other in mode of cultivation or improvement, or the like, that one visibly and continuously receives from the other some benefit or service, which would constitute a valid easement if they were separately owned, and which is apparently intended to be permanently annexed to the former tenement, he ought, on conveyance of that tenement, to be deemed estopped to deny that such service or benefit passes by the grant as an easement appurtenant. It would perhaps be difficult, however, to explain some of the adjudications on this subject by reference to the principles of estoppel.

EASEMENT MUST BE APPARENT AND CONTINUOUS TO PASS BY IMPLICATION on conveyance of part of an entire heritage, or of one of two adjacent tenements, except where it is an easement of strict necessity: *Glaive v. Harding*, 27 L. J. Ex. 286; *Polden v. Bastard*, 8 L. T., N. S., 535; S. C., 4 Best & S. 258; S. C. affirmed, 13 L. T., N. S., 441; S. C., 7 Best & S. 130; S. C., L. R., 1 Q. B., 156; *Suffield v. Brown*, 9 L. T., N. S., 627; S. C., 10 Jur., N. S., 111; S. C., 33 L. J. Ch. 249; S. C., 4 De G. J. & S. 185; S. C., 12 Week. Rep. 356;

Pyr v. Carter, 1 Hurlst. & N. 916; S. C., 28 L. J. Ex. 268; *Denton v. Leddell*, 23 N. J. Eq. 64; *Lampman v. Milks*, 21 N. Y. 505; *Butterworth v. Crawford*, 46 Id. 349; S. C., 7 Am. Rep. 352; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Francie's Appeal*, 96 Id. 200; *Evans v. Dana*, 7 R. I. 306; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 Id. 571. In the case last cited, Brayton, C. J., said: "The rule requires that the easement, to pass as such by implied grant, must be continuous and apparent. It must be attended with some alteration of the tenements, which in its nature is obvious and permanent, sometimes expressed in other words; that the easement must be apparent, the alteration must be such as may be seen on inspection to be adapted to the use of the estate to which it is annexed, and to be intended for its use. It must be continuous: this is the term used. This is explained in the books to mean an easement to the enjoyment of which no act of the party is necessary, and the instance given of such is a spout which is attached casting the water, whenever it falls upon the adjoining estate without any act done, and existing independent of any act of user. So of a watercourse, whether natural or artificial; water pipes to bring water upon or carry it off the premises." In *Butterworth v. Crawford*, 46 N. Y. 349; S. C., 7 Am. Rep. 352, it is said that the doctrine is "confined to cases where an apparent sign of servitude exists on the part of one of them [the tenements] in favor of the other; or, as expressed in some of the authorities, where the marks of the burden are open and visible."

The distinction between "apparent" and "non-apparent" servitudes under the Louisiana code is thus defined: "Apparent servitudes are such as are to be perceivable by exterior works; such as a door, a window, an aqueduct. Non-apparent servitudes are such as have no exterior sign of their existence; such, for instance, as the prohibition of building on an estate, or of building above a particular height:" Rev. Civ. Code, art. 728. In *Pyer v. Carter*, 1 Hurlst. & N. 916; S. C., 28 L. J. Ex. 268, an easement is said to be apparent not only where it must necessarily be seen, but also where it might be seen on careful inspection by a person ordinarily conversant with the subject. That was a case where the part conveyed was, as we shall presently see, held subject to an easement in favor of the part retained by the grantor. The decision certainly goes to the verge of the law in favor of implied easements, and has been much criticised. Where the grantee, before the conveyance, had erected a mill and dam on the land granted, without the knowledge of the grantor, who resided abroad, and the dam caused the water to flow back on other land of the grantor, there was held to be no easement implied in the conveyance, because it was not apparent to the grantor: *Tabor v. Bradley*, 18 N. Y. 109.

By a "continuous" easement is meant, as already stated in the quotation given from *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 571, an easement which continues without any further act of the vendor, and not one which depends upon the repetition of particular acts. It must be an easement which is self-perpetuating without human aid: *Lampman v. Milks*, 21 N. Y. 505. "Continuous" and "discontinuous" easements are thus defined in Rev. Civ. Code La., art. 727: "Continuous servitudes are those whose use is or may be continual without the act of man. Such are aqueducts, drain, view, and the like. Discontinuous servitudes are such as need the act of man to be exercised. Such are the rights of passage, of drawing water, pasture, and the like."

Upon the principle of estoppel it is easy to account for the rule that an easement must be apparent and continuous in order to pass by implication.

on severance of a heritage by conveyance of part. Estoppel is to prevent fraud; but there is no fraud in denying after conveyance a pretended easement which was unknown to the grantee at the time of conveyance, because not apparent, and therefore could not have operated as an inducement to the purchase. So there can be no fraud in denying a discontinuous apparent easement depending upon the repetition, by the grantor or his servants, of acts done on his own land, because, however frequent the repetition, such a use, depending as it does on constant affirmative acts, can never become perpetual, and can not, therefore, be presumed by the grantee to have been intended to be permanent. If the true reason for allowing an implied grant of an easement on conveyance of part of a tract of land is that it is necessary to the enjoyment of the thing granted, we can not see why it should not apply to non-apparent and discontinuous easements as well as to those which are apparent and continuous.

Various examples of "apparent" and "non-apparent," "continuous" and "discontinuous" easements will be referred to in subsequent sections of this note discussing particular classes of easements.

WHETHER EASEMENT MUST BE NECESSARY TO PASS BY IMPLICATION.—As already stated, if a quasi easement over other land of the grantor appertaining to land granted is not only apparent and continuous, but necessary to the enjoyment of the part granted, there is no question that it will pass by implication as appurtenant to such grant. But must it be necessary in order to pass? It is clearly intimated in several cases that it need not be: *Lampman v. Milks*, 21 N. Y. 505; *Fetters v. Humphreys*, 18 N. J. Eq. 260. In other cases, however, necessity of the easement to the full enjoyment of the premises is held to be an essential requisite in order that the easement may pass by implication: *Mitchell v. Seipel*, 53 Md. 251; S. C., 36 Am. Rep. 404, and note; S. C., 9 Id. 610; *Brakely v. Sharp*, 9 N. J. Eq. 9; S. C., 10 Id. 206; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Phillips v. Phillips*, 48 Id. 178; *Sanderlin v. Baxter*, 76 Va. 299; S. C., 44 Am. Rep. 165, and note; S. C., 13 Rep. 768.

In Massachusetts it is the established doctrine that an easement will not pass by implication in such a case unless it is strictly and absolutely necessary to the enjoyment of the tenement granted: *Nichols v. Luce*, 35 Am. Dec. 302; *Carbrey v. Willis*, 7 Allen, 364; *Randall v. McLaughlin*, 10 Id. 366; *Buss v. Dyer*, 125 Mass. 290. In the case last cited the doctrine that a deed of premises carries the right to continue, as easements, all privileges or conveniences in or upon adjoining lands of the grantor which were apparent and had been used by the grantor in connection with the premises before the conveyance, was denied to be a correct exposition of the law. In that state, if the grantee of premises from which a drain has been constructed by the grantor before the grant through his adjacent land can provide other drainage over his own land, at reasonable expense and trouble, there is no easement in the existing drain: *Carbrey v. Willis*, 7 Allen, 364; *Randall v. McLaughlin*, 10 Id. 366. So where the grantor, having built two houses on adjacent lots, with a chimney between them resting wholly on one of the lots, conveyed the other lot, it was held that no easement in the chimney passed to prevent the grantor from tearing it down, because it was not strictly necessary: *Buss v. Dyer*, 125 Mass. 287. But the better and the prevailing opinion is, perhaps, that although in order to survive the severance, the easement must be necessary to the full enjoyment of the estate granted: *Ewart v. Cochrane*, 4 Macq. 123; *Mitchell v. Seipel*, 53 Md. 251; S. C., 36 Am. Rep. 404, and note; S. C., 9 Id. 610; *Simmons v. Cloonan*, 81 N. Y. 557; this does not mean an absolute and strict necessity, such as is required to create a way by necessity:

Fetters v. Humphreys, 18 N. J. Eq. 260; *Lampman v. Milks*, 21 N. Y. 505; *Simmons v. Cloonan*, 81 Id. 557; *Ewart v. Cochrane*, 4 Macq. 123. It means that the easement must be "necessary for the reasonable and comfortable enjoyment of the property as it existed before the time of the grant:" *Per Lord Chancellor Campbell in Ewart v. Cochrane, supra*. In other words, it means the necessity as it exists at the time of conveyance, without any alteration: *Pyer v. Carter*, 1 Hurlst. & N. 916; S. C., 26 L. J. Ex. 268. If the easement must be absolutely necessary, in the strict sense of the term, to the enjoyment of the granted premises, we can not see, as already stated, why the rule does not apply also to "non-apparent" and "discontinuous" easements, and it is so held in Goddard's Law of Easem., Bennett's ed., 121, 122.

EASEMENT MUST BE IN ACTUAL EXISTENCE AND USE at the time of the grant: *Glare v. Harding*, 27 L. J. Ex. 288; *Gottschalk v. De Santos*, 12 La. Ann. 473. An intent to create the easement where it has not been perfected so as to be useful is not enough, as where the house granted is unfinished at the time of the grant, and it is uncertain whether certain spaces left in the walls are intended for windows or doors, or whether they are designed to lead: *Glare v. Harding, supra*. So under the Louisiana statute providing that "the use which the owner has intentionally established on a particular part of his property, in favor of another part, is equal to a title with respect to perpetual and apparent servitudes thereon, is meant the disposition which the owner of two or more estates has made for their respective use," it is held that the easement or servitude must be perfected so as to be useful at the time of the grant in order to constitute a sufficient *destination du père de famille*: *Gottschalk v. De Santos*, 12 La. Ann. 473. In *Simmons v. Cloonan*, 81 N. Y. 557, it is held that, in order to pass, it is not necessary that the easement should be in actual use by the grantor at the execution of the conveyance, but that his knowledge of its existence is enough. In order to destroy an apparent servitude marked by visible signs in the construction of the buildings on the granted premises, or the like, under the Louisiana code an obstruction to the servitude before conveyance must, it seems, be permanent in its character: *Taylor v. Boulware*, 17 Rep. 271.

PARTICULAR CLASSES OF EASEMENTS, IMPLIED GRANT OR ON SEVERANCE.—
1. *Easements as to Aqueducts, Race-ways, Drains, Wells, and Other Water Rights*.—In one of the earliest cases on this subject it was resolved that "if one erect a house and build a conduit thereto in another part of his land and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary, *et quasi*, appendant thereto:" *Nicholas v. Chamberlain*, Cro. Jac. 121. And it is well settled that on a conveyance of one of two tenements, or of part of an entire estate, a right to an aqueduct or artificial watercourse in the land retained by the grantor, constructed to carry water to the granted premises for irrigation, watering cattle, or the like, is a continuous and apparent easement, especially if necessary to the reasonable enjoyment of the premises as granted, which will pass by implication: *Cave v. Crafts*, 53 Cal. 135; S. C., 6 Rep. 423; *Brakely v. Sharp*, 9 N. J. Eq. 9; S. C., 10 Id. 206; *Vermont etc. R. R. Co. v. Hill's Estate*, 23 Vt. 681; *Coolidge v. Hager*, 43 Id. 9; *Wardle v. Brocklehurst*, 1 El. & El. 1058. And in *Vermont etc. R. R. Co. v. Hill's Estate*, 23 Vt. 681, it is intimated that if the conveyance in such a case contains covenants of warranty, the grantor is bound to defend the grantee's title to the easement; but this is denied in *Swazey v. Brooks*, 34 Id. 455. Where the owner of two adjoining tracts

erected a tank on one, with pipes leading to cattle-sheds on the other, and conveyed the latter tract with "all waters, watercourses, rights, privileges, advantages, and appurtenances whatsoever, to the same hereditaments, and premises belonging or appertaining, or with the same or any part thereof now or heretofore used and enjoyed, or reputed as part or parcel thereof or appurtenant thereto," it was held that a right to the use of the pipes and tanks passed even, it seems, though only convenient and not necessary to the enjoyment of the premises: *Watts v. Kelson*, L. R., 6 Ch. Ap., 166; S. C., 40 L. J. Ch. 126; S. C., 24 L. T., N. S., 209; S. C., 19 Week. Rep. 338, *per Mellish*, L. J.

In *Manning v. Smith*, 6 Conn. 289, it appeared that two persons being owners of several tenements, one of them constructed an aqueduct from a spring on the other's land to his own land and used it for several years, when he conveyed his tract to the owner of the other, who a few days afterwards reconveyed the same to him, with the "appurtenances," and he continued for a period constituting, with his former user, the full term of fifteen years to convey water through said aqueduct; but it was held that there was no easement therein, by implication or by prescription. But the doctrine of this case is denied in *Vermont etc. R. R. Co. v. Hill's Estate*, 23 Vt. 685. But where the grantor purchased the tract, as in that case, with the inchoate easement upon it and reconveyed in such a short time, it is clear that no such presumptions would arise in favor of the implied grant of the pretended easement as would have existed if he had been the original constructor of the aqueduct. By a conveyance or devise of a mill, with the "appurtenances," or other like term, it is well established that a right to a race-way through other land of the grantor for the supply of said mill will pass: *Pickering v. Stapler*, 9 Am. Dec. 336; *Strickler v. Todd*, 13 Id. 649, and note discussing the point as to what will pass under the word "appurtenances;" *New Ipswich W. L. Factory v. Batchelder*, 14 Id. 346; *Baker v. Bessey*, 73 Me. 472; S. C., 40 Am. Rep. 377, and note. So without the word "appurtenances" a conveyance of a mill will pass a right to a race-way leading to it from the grantor's other land: *Blake v. Clark*, 6 Greenl. 436; *Shephardson v. Perkins*, 10 Rep. 371 (N. H.); *Simmons v. Cloonan*, 81 N. Y. 557. So though not absolutely essential if the implied grant of such race-way is necessary to the full enjoyment of the mill: *Simmons v. Cloonan*, *supra*. So a right to flow other land of the grantor to the extent that it is flowable at the time of the deed will pass by a conveyance of a mill and "appurtenances:" *Hathorn v. Stinson*, 25 Am. Dec. 228; *Wilcoxon v. McGhee*, 54 Id. 409. So where the land occupied by the mill is conveyed by metes and bounds with the "hereditaments and appurtenances thereunto belonging:" *Hadden v. Shoutz*, 15 Ill. 581. Where a grantor before the grant has diverted a stream which formerly overflowed the part granted by constructing an artificial channel on his other land, neither he nor his grantees can, after the conveyance, restore the stream to the original channel: *Lampman v. Milks*, 21 N. Y. 505.

A covered drain through the soil, not visible on the surface, leading from the premises granted through other premises of the grantor, has been held to be a non-apparent easement so that it will not pass by implied grant, not being absolutely necessary: *Butterworth v. Crawford*, 46 N. Y. 349; S. C., 7 Am. Rep. 352; *Dolliff v. Boston etc. R. R.*, 68 Me. 173. But in other cases of this sort drains have been declared to be apparent, continuous, and necessary easements: *Pyer v. Carter*, 1 Hurlst. & N. 916; S. C., 26 L. J. Ex. 268; *Ewart v. Cochrane*, 4 Macq. 117; *Thayer v. Payne*, 2 Cush. 327; *Parsons v. Johnson*, 68 N. Y. 62; S. C. 23 Am. Rep. 149; S. C., 4 N. Y. Week. Dig. 288; *Sandelin v. Baxter*, 76 Va. 299; S. C., 44 Am. Rep. 165, and note; S. C., 13

Rep. 766. In *Pyer v. Carter, supra*, it was held that a drain over other land of the grantor, which was not visible, would nevertheless pass by grant of part of a tract as an apparent easement, because the grantee might have known that there was a drain and ascertained its location by careful inspection.

Where the owner of an entire heritage, or of two adjoining tenements, with his tenants, has been in the habit of taking water from a well, pump, or hydrant on part of the heritage, or on one of the tenements, for the benefit of the other part or tenement, and grants the latter, no right to the use of the well, etc., passes by implication, because it is not a continuous easement: *Evans v. Dana*, 7 R. I. 306; *Duvel v. Boisblane*, 1 La. Ann. 407; *Francie's Appeal*, 96 Pa. St. 200; *Polden v. Bastard*, 8 L. T., N. S., 535; S. C., 4 Best & S. 258; S. C. affirmed, 13 L. T., N. S., 441; S. C., L. R., 1 Q. B., 156; S. C., 7 Best & S. 130. So where a tenant of one of two tenements has been in the habit of pumping water from a well on the other tenement through a pipe leading therefrom, and afterwards buys the tenement occupied by him, the adjoining tenement being purchased by the tenant thereof, and both conveyances making the premises subject to all rights of way, water, and other easements, if any: *Russell v. Harford*, L. R., 2 Eq., 507. It was there held that the right was a mere license.

2. *Easement in Party Wall*.—Where the owner of two adjacent lots builds a house on each with a division wall resting partly on each lot or wholly on one, and then sells and conveys both by metes and bounds, the purchaser of the lot on which the wall does not rest in whole or in part has an easement, for support, by implication, in the wall so far as it rests on the other lot, such easement being regarded as apparent, continuous, and necessary: *Eno v. Del Vecchio*, 4 Duer, 53; S. C., 6 Id. 17; *Webster v. Stevens*, 5 Id. 553; *Popper v. Peck*, 14 N. Y. Week. Dig. 235; *Henry v. Koch*, 80 Ky. 391; S. C., 44 Am Rep. 484; S. C., 15 Rep. 268.

3. *Easement of Light and Air*.—In England it is well established that if the owner of two adjacent lots builds a house on one of them with windows overlooking the other, and then conveys or leases to another the lot with the house on it, neither he nor a subsequent grantee can build a house on the adjoining lot which will darken the windows of such house, because an easement by implication is given to the grantee or lessee of the house: *Palmer v. Fletcher*, 1 Lev. 122; *Cox v. Mathews*, 1 Vent. 137; *Swansborough v. Coverly*, 9 Bing. 305; *Barnes v. Loach*, L. R., 4 Q. B. Div., 494; S. C., 48 L. J. Q. B. 756. So where houses are built on both lots at about the same time and both are sold at the same auction: *Compton v. Richards*, 1 Price, 27. So it seems, though the lot sold is vacant at the time of sale, if it is sold with an intimation from the purchaser that he intends to build thereon: *Robinson v. Grave*, 27 L. T., N. S., 648. So though the walls containing the windows are taken down and set back if new windows of the same size and relative position are made: *Barnes v. Loach, supra*. In America the authorities on this point are very conflicting: *Morrison v. Marquarett*, 24 Iowa, 35, where Dillon, C. J., reviews a large number of cases, and arrives at a conclusion apparently opposed to the implication of any easement. In Louisiana it is settled, in accordance with the English doctrine, that where one grants a house with windows overlooking other vacant land of his he can not afterwards by building on the vacant lot darken the windows: *Lervillebeuvre v. Cosgrove*, 13 La. Ann. 323; *Cleris v. Tieman*, 15 Id. 316; *Taylor v. Boulware*, 17 Id. 271. And the fact that some boards have been nailed over the windows and so remain at the time of the sale will not, it seems, vary the rule: *Lervillebeuvre v. Cosgrove*, 13 Id. 323; *Taylor v. Boulware*, 17 Rep. 271.

So in New Jersey it has been held that where one sells a house with windows overlooking other vacant property belonging to him, an implied easement of light and air accompanies the grant, so as to prevent the grantor or his assigns from obstructing windows: *Robeson v. Pittenger*, 32 Am. Dec. 416, and note. So in Maryland, where the owner of two lots leased one for a long term, giving the lessee the privilege of placing certain lights in the division wall which he proposed to erect between the two lots, which he accordingly did, where the lessor subsequently conveyed the reversion to the tenant, with all "rights, alleys, ways, waters, privileges, appurtenances, and advantages," etc., an easement of light was held to pass by implication: *Janes v. Jenkins*, 34 Md. 1; *Mitchell v. Seipel*, 53 Id. 251; S. C., 36 Am. Rep. 404, and note; S. C., 9 Rep. 610. In Pennsylvania, in *Kay v. Stallman*, 2 Week. N. C. 643, an easement of light and air was held to pass where the grantor conveyed part of a lot with a house thereon, with six windows and a door overlooking the residue, the erection of a large building obstructing the lights was enjoined. But in *Haverstick v. Sipe*, 33 Pa. St. 368, a sale of a house with windows overlooking an adjacent vacant lot of the grantor was held to give no easement to prevent an obstruction of the windows. And in *Rennyson's Appeal*, 9 Rep. 826; S. C., 8 Week. N. C. 383, it was said that no easement would be implied in such a case unless absolutely necessary to the enjoyment of the tenement. And this is substantially the rule laid down in *Turner v. Thompson*, 58 Ga. 268; S. C., 24 Am. Rep. 497; *Powell v. Sims*, 5 W. Va. 1; S. C., 13 Am. Rep. 629; *White v. Bradley*, 66 Me. 254. So it was held in *Collier v. Pierce*, 7 Gray, 18, and *Randall v. Sanderson*, 111 Mass. 114, that an easement of light and air would not be implied upon a simultaneous sale by the owner of two lots, with a house on one containing windows overlooking the other, where such easement was not necessary to the enjoyment of the grant; although in the latter of the cases referred to the windows in question were the sole means of admitting light to the rooms in which they were. In *Keats v. Hugo*, 115 Id. 204; S. C., 15 Am. Rep. 80, it is laid down in still more general terms that a sale of a house with windows overlooking other lands of the grantor imports no easement of light and air. To the same effect is *Mullen v. Stricker*, 19 Ohio St. 135. A lease of part of a house with the "appurtenances" for a store was held, in *Doyle v. Lord*, 64 N. Y. 432; S. C., 21 Am. Rep. 629; S. C., 2 Rep. 73, to give an easement for light and air in a certain yard in the rear. But in *Palmer v. Wetmore*, 2 Sandf. 316; *Myers v. Gemmel*, 10 Barb. 537, a lease of a house with windows overlooking other land of the lessor would not prevent the latter from building on his other land so as to darken the windows in the house demised. For a further discussion of this subject, see the note to *Story v. Odin*, 7 Am. Dec. 49, examining many other cases.

4. *Easement in Way*.—A mere way used for any length of time by the owner of land for the purpose of going over one part of it to another is regarded as discontinuous, and does not, as a general rule, ripen into an easement upon conveyance of the land to which it is appurtenant with or without "appurtenances," unless it be a way of necessity: *Whalley v. Tompson*, 1 Bos. & Pul. 371; *Pheysey v. Vicary*, 16 Mee. & W. 484; *Thomson v. Waterlow*, L. R., 6 Eq., 36; *Worthington v. Gimson*, 2 El. & El. (105 Eng. Com. L.) 618; S. C., 29 L. J. Q. B. 166; *Pearson v. Spencer*, 1 Best & S. 571; S. C., 3 Id. 761; *Langley v. Hammond*, L. R., 3 Ex., 161; *Watts v. Kelson*, L. R., 6 Ch. Ap., 166; S. C., 40 L. J. Ch. 126; S. C., 24 L. T., N. S., 209; S. C., 19 Week. Rep. 338; *Leonard v. White*, 5 Am. Dec. 19; *Grant v. Chase*, 9 Id. 161; *Baker v. Clark*, 17 Id. 428; *Nichols v. Luce*, 35 Id. 302; *Fisk v. Haber*,

7 La. Ann. 652; *Cleris v. Tieman*, 15 Id. 316; *Warren v. Blake*, 54 Me. 276; *Oliver v. Hook*, 47 Md. 301; *Mitchell v. Seipel*, 53 Id. 251; S. C., 36 Am. Rep. 404; S. C., 9 Rep. 610; *Fetters v. Humphreys*, 18 N. J. Eq. 260; S. C., 19 Id. 471; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; *Parsons v. Johnson*, 68 N. Y. 62; S. C., 23 Am. Rep. 149; S. C., 4 N. Y. Week. Dig. 288; *Schrymser v. Phelps*, 62 How. 1; *Shoemaker v. Shoemaker*, 8 Abb. N. C. 80; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 572, 573; *O'Rorke v. Smith*, 11 Id. 259; S. C., 23 Am. Rep. 440; *Standiford v. Gondy*, 6 W. Va. 364. So held, though the way is worn into a marked path: *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 572. So where the way was marked by a pair of bars: *Oliver v. Hook*, 47 Md. 301. So where it was an alley-way between two tenements: *Cleris v. Tieman*, 15 La. Ann. 316; *Fetters v. Humphreys*, 18 N. J. Eq. 260; S. C., 19 Id. 471. But it is suggested in *Watts v. Kelson*, L. R., 6 Ch. Ap., 166; S. C., 40 L. J. Ch. 126; S. C., 24 L. T., N. S., 209; S. C., 29 Week. Rep. 338, that the rule might be different in case of a paved way. In *Glave v. Harding*, 27 L. J. Ex. 286, Bramwell, B., intimates the opinion that a right of way to a particular door or gate may constitute an apparent and continuous easement. A fenced way was held sufficient to pass by implication in *Phillips v. Phillips*, 48 Pa. St. 178; so an alley-way: *McCarty v. Kitchenman*, 47 Id. 239; so, generally, a permanent road of any kind: *Pennsylvania R. R. Co. v. Jones*, 50 Id. 417. A way of necessity of course passes by implication: *Lawton v. Rivers*, 13 Am. Dec. 746, note; *Cooper v. Maupin*, 35 Id. 464, note; *Collins v. Pierce*, 38 Id. 61; *Stuyvesant v. Woodruff*, 47 Id. 156; *Snyder v. Warford*, 49 Id. 94, and notes. A grant of land calling for a street, way, or alley over adjacent land of the grantor as a boundary gives an easement in such street or way on the principle of estoppel: *Livingston v. Mayor etc. of New York*, 22 Id. 622; *Van O'Linda v. Lathrop*, 32 Id. 261, and note; *Carlin v. Paul*, 47 Id. 139.

5. *Other Easements.*—An easement or privilege of taking sea-weed on other land of the grantor for the benefit of a tract conveyed does not pass by implication, though the grantor while owning both tracts constantly exercised such privilege, because it is not continuous: *Kenyon v. Nichols*, 1 R. I. 411. So where the owner of a dock and wharf has been in the habit of allowing the bowsprits of vessels in the dock to project over the wharf, no easement for that purpose will be implied in favor of the dock owner upon severance of the title to the dock and wharf: *Suffield v. Brown*, 9 L. T., N. S., 627; S. C., 10 Jur., N. S., 111; 4 De G. J. & S. 185.

MODE OF SEVERANCE AS AFFECTING CONTINUANCE OF EASEMENT.—This doctrine of implied easements in favor of one tract of land as against another belonging to the same owner, upon severance of ownership, has not been limited to cases of direct conveyance by the common owner. Thus on partition of lands of a deceased person *quasi* easements in use on one part for the benefit of another, and necessary for its reasonable and convenient enjoyment, have been held to continue as true easements: *Kilgour v. Ashcom*, 5 Har. & J. 82; *Burwell v. Hobson*, 12 Gratt. 322; *Goodal v. Godfrey*, 53 Vt. 219; S. C., 38 Am. Rep. 671. So in case of an administrator's sale of two lots to different owners: *Durel v. Boisblanc*, 1 La. Ann. 407. But see, *contra*, *Mabie v. Matleson*, 17 Wis. 1. So in case of an assignment of dower, continuous and apparent easements used by the owner of the heritage in favor of the part set off to the widow as against other parts of the tract have been held to pass: *Morrison v. King*, 62 Ill. 30. So in case of a voluntary partition of lands by co-tenants, the same doctrine has been applied: *Thompson v. Miner*, 30 Iowa, 386. But in *Schrymser v. Phelps*, 62 How. Pr. 1, it was held that

the doctrine did not apply in favor of a purchaser of part of a tract of land at a foreclosure sale, because the purchaser was not the grantee of the mortgagor.

IMPLIED RESERVATION OF EASEMENTS IN PART CONVEYED.—There is much conflict on the question as to whether or not the rule as to implication of apparent and continuous easements in favor of one tenement as against another belonging to the same owner, on severance of the ownership, applies for the grantor's benefit where the servient tenement is conveyed and the dominant tenement retained. In *Pyer v. Carter*, 1 Hurlst. & N. 916; S. C., 26 L. J. Ex. 268, it was decided that an implied reservation of an existing quasi easement would arise in such a case. But this decision was overruled in *Sufield v. Brown*, 9 L. T., N. S., 627; S. C., 10 Jur., N. S., 111; 33 L. J. Ch. 249; 4 De G. J. & S. 185; and it must now be regarded as settled in England that no reservation of an easement will be implied on conveyance of part of a tract in favor of the part retained, unless it is an easement of strict and obvious necessity: *Wheeldon v. Burrows*, L. R., 12 Ch. Div., 31; S. C., 7 Rep. 288; 20 Alb. L. J. 507; *Crossley v. Lightowler*, L. R., 2 Ch., 478. In this country it has been held in a number of cases that the rule is the same whether the dominant tenement is granted or retained, and that in either case a continuous and apparent easement in the one for the benefit of the other will be implied: *Seibert v. Levan*, 49 Am. Dec. 525; *Carty v. Shields*, 5 Rep. 728; *Lampman v. Milks*, 21 N. Y. 505; *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489; *Denton v. Ledkell*, 23 N. J. Eq. 64; *Fetters v. Humphrey*, 18 Id. 260 (overruling *Brakely v. Sharp*, 9 Id. 9); *Harwood v. Benton*, 32 Vt. 724. But there are several American cases holding to the doctrine of the later English decisions on this point, limiting the rule as to implied reservations of easements to those of strict necessity: *Hathorn v. Stinson*, 25 Am. Dec. 228; *Preble v. Reed*, 17 Me. 169; *Warren v. Blake*, 54 Id. 276; *Burr v. Mills*, 21 Wend. 290; *Shoemaker v. Shoemaker*, 11 Abb. N. C. 80; *Outerbridge v. Phelps*, 13 Jones & S. 555. If the easement is strictly necessary to the enjoyment of the land retained or last sold, such as a way by necessity, a reservation of it will be implied: *Shubrook v. Tufnell*, 46 L. T., N. S., 886; *Pinnington v. Galland*, 9 Ex. 1; *Davies v. Sear*, L. R., 7 Eq., 427; *Pingree v. McDuffie*, 56 N. H. 306.

SHAW v. SOUTH CAROLINA R. R. Co.

[5 RICHARDSON'S LAW, 462.]

OWNER OF GOODS SHIPPED BY CARRIER CAN NOT ACCEPT PART AND ABANDON RESIDUE, on account of a loss by leakage, and recover of the carrier the value of the goods abandoned; as where molasses is shipped and some of the casks lose by leakage, and the owner accepts the residue and refuses to receive the leaking casks.

MEASURE OF DAMAGES FOR LOSS OF GOODS BY COMMON CARRIER is the price at the place of delivery.

ACTION by *sum. pro.* to recover for loss sustained in two barrels of molasses, which the defendants undertook to carry. It appeared that ten barrels of molasses were shipped to the plaintiffs in good order. The plaintiffs received eight barrels, but

refused to receive the other two on account of leakage of a considerable part of their contents. The printed freight lists of the defendants stipulated that they should not be liable for leakage of molasses, but the court below held that this applied only to ordinary leakage, and not such as appeared in this case. The judge thought, however, that the carriers were liable only for the quantity of molasses actually lost, and not for the value of the two leaking casks, and the amount of the actual loss being below his jurisdiction, ordered a nonsuit. Appeal and motion to set aside the nonsuit.

Kershaw, for the motion.

Shannon, contra.

By Court, O'NEALL, J. It would be enough for this case to say that the plaintiffs, having accepted eight out of the ten barrels shipped, could have no pretense to abandon the remaining two. They must abandon all or none.

But there is no such arbitrary rule which compels a carrier to pay the entire value of an article less in quantity but uninjured in quality.

The owner is entitled to recover his damages. What are they? The price of the thing lost at the place of delivery. Beyond this the party can not claim.

In insurance cases, abandonment can only be made where the thing assured is found to be damaged more than half its value. Sedg. on Dam. 256; *Cohen v. The Fire & Marine Ins. Co.*, Dud. 147, 151 [31 Am. Dec. 549]. Surely, if this be the rule in such cases, a carrier could not be held liable for an abandonment, where the loss did not approach this arbitrary standard. But we have no such rule. The party is entitled to demand from the carrier that he should be put in as good a condition, as to his goods, as he would have been in if all had been delivered. This is satisfied by paying for the quantity lost at the price which it bore at the place of delivery: *Brandt v. Bowlby*, 22 Eng. Com. L. 390. In this case, no demand was made for more than the cost. If it had been, I would have allowed the Camden price of molasses to the extent lost.

In *Smith v. Griffith*, 3 Hill (N. Y.), 333 [38 Am. Dec. 639], which was a case against common carriers, Nelson, C. J., states the rule as I understand it: "If goods are wholly lost or destroyed, the owner is entitled to their full worth at the time of such loss or destruction. In trover, the measure of damages is the value of the goods at the time and

or, perhaps, at any time between that and the trial. And upon the same principle, if the goods are partially injured, and the party asks redress for the qualified damages, the measure should be in like proportion."

The company, in this case before us, offered to deliver the molasses when it arrived, and have been ready to deliver whatever is left (the leakage still continuing) at all times since.

The plaintiffs would not receive the diminished quantity, unless the company would pay the damages resulting from leakage.

It is beyond all doubt that the plaintiffs could impose no such conditions. They were bound to take the goods and test the liability of the defendants for the damage which had been sustained. For it is well settled that the acceptance of the goods would in no wise affect that question: *Sedg. on Dam.* 376.

How the decision affects the plaintiffs' right of property to the molasses remaining in the carrier's possession is difficult to conceive. I should think it had directly a contrary effect. For in affirming that the plaintiffs could only recover for the portion lost, it is assumed that they might have received what was left.

'The motion is dismissed.

EVANS, WARDLAW, FROST, WITHERS, and WHITNER, JJ., concurred.

Motion dismissed.

MEASURE OF DAMAGES FOR LOSS OF GOODS BY COMMON CARRIER: See *Edminson v. Baxter*, 9 Am. Dec. 751; *McGregor v. Kilgore*, 27 Id. 260; *Hand v. Baynes*, 33 Id. 54; *Smith v. Griffith*, 38 Id. 639, and notes.

THAT OWNER CAN NOT REJECT GOODS FOR PARTIAL LOSS BY CARRIER, where those remaining are uninjured in quality, and recover their entire value, but can only recover the price of those lost, is a point upon which the principal case is cited and followed in *Michigan R. R. Co. v. Bivens*, 13 Ind. 285.

MARTIN v. RANLETT.

[*6 RICHARDSON'S LAW*, 541.]

PROOF, IN TRESPASS TO TRY TITLE, OF CLAIM OF TITLE FROM COMMON SOURCE by both parties is sufficient to enable the plaintiff to avoid a nonsuit, as where it is shown that both claim under execution sales against the same party.

DEFENDANT SUPPLYING PROOF OF COMMON ORIGIN OF TITLE claimed by both parties, if the plaintiff fails to do so, will prevent a nonsuit in the appellate court in trespass to try title, although a nonsuit was erroneously refused in the first instance in the court below.

DEFENDANT IS NOT ESTOPPED TO SHOW BETTER TITLE THAN COMMON ORIGIN, from which both trace title, and under which the defendant obtained possession, in trespass to try title, but it is not sufficient merely to raise a doubt as to which is the paramount title.

PURCHASER AT SHERIFF'S SALE DOING ANY ACT PREVENTING FAIR COMPETITION vitiates the sale, and obtains no title; as where the purchaser at such a sale, being a mortgagee of the same land, exhibited his mortgage at the sale and proclaimed that the sale was only to complete the title, that is to say, that it was a sale of the equity of redemption only, when in fact the debtor's entire estate was on sale, and thereby obtained the land at a nominal price.

SUBSEQUENT EXECUTION PURCHASER MAY Show FRAUD IN PRIOR EXECUTION SALE of the same land, whereby the prior purchaser prevented competition and obtained the land at a nominal price, in trespass to try title, without having the prior sale set aside; and the finding of fraud by the jury in such a case will not be disturbed.

TRESPASS to try title. On behalf of the plaintiff it appeared that both parties claimed under purchases on execution on judgments against one Marsh; that defendant was tenant of the heirs of one Gary, who in 1837 took a mortgage of the premises from Marsh to secure a certain bond; that he recovered judgment on the bond against Marsh in 1840, and on execution on said judgment purchased the premises in 1843 for twelve dollars; that Gary exhibited his mortgage at the sale, and said the sale was made to complete the title; that the plaintiff purchased the same premises on a subsequent execution sale under a judgment recovered against Marsh in 1829, and received a sheriff's deed. Motion for a nonsuit denied. The defendant offered evidence tracing his title to Marsh, and also some evidence of a not very satisfactory nature to show that he had acquired a better title than that of Marsh. Verdict for the plaintiff, under instructions submitting the question of fraud in Gary's purchase to the jury. The judge stated his own opinion to be that the evidence of fraud was not sufficient. Appeal and motion for a nonsuit, because the plaintiff had failed to show title, and motion for a new trial, because, among other things, the judge had erroneously instructed the jury (though it did not appear from the judge's report) that the defendant, having purchased under Marsh, could not show that he had acquired a better title from another source; because the verdict was against law and evidence, there being no proof of fraud in the sale to Gary, and if there was, a superior title to that of Marsh had been shown, and the fraud, if proved, was insufficient to invalidate a title under sheriff's sale which had been subsisting more than four years.

Bellinger, for the appellant.

Bauskett and Aldrich, contra.

By Court, WITHERS, J. The first question to be considered is, whether the defendant is entitled to a nonsuit. The motion proceeds upon the footing of the general rule, that the plaintiff is to show on pain of nonsuit, in action of trespass to try title, a good and perfect title, which implies that he shall connect himself with the oldest grant of the *locus in quo*, or else produce proof, which is held to be equivalent. The plaintiff founds his claim to be exempt from this rule on the footing that he had shown a claim of title by the defendant and himself from a common source, to wit, from one Marsh; and the defendant, for the purpose of his motion for nonsuit, urges in reply that the plaintiff had not shown that fact.

Upon examining the brief, supported by the notes of the progress of the trial, made by the circuit judge, we find it had appeared in behalf of Martin, the plaintiff, that Gary, who was defendant's lessor, had taken a mortgage from Marsh as seised in fee of the premises in question; that he had purchased the same from the sheriff in 1843, at an official sale, under an execution of his own against Marsh; and that, at a subsequent time, the plaintiff had bought the same premises, at an official sale by the sheriff, under an older execution against Marsh. We think this evidence did develop the fact that both parties traced their claim of title to a common source sufficiently to render it improper to grant a motion of nonsuit.

Supposing, however, the plaintiff had left his case defective on this head, and the proof needed to show a common origin of the title claimed by both parties appeared in the evidence adduced for the defendant, it does not follow he would be entitled to a nonsuit here. It was said in the case of *Thomas v. Jeter*, 1 Hill (S. C.), 382, as follows: "Even if the presiding judge had erroneously refused the nonsuit, and the defendants, in their defense, had supplied the proof necessary to make out the plaintiff's case, a nonsuit could not be directed here: it was their own imprudence to supply the proof, and when, upon the whole proof, it appears that the plaintiffs are entitled to recover [and we may add, when the jury have ratified it], it would be sporting with justice to say they should be turned out of court on account of such an error of the judge."

That the plaintiff need not travel beyond a source of title, common to himself and his adversary, is sufficiently established

by the case just cited from 1 Hill, 382, and *Hill v. Robertson*, 1 Stroh. L. 1.

The question involving the merits of the contest then arose, to wit, Which party had the better right to the title conceded once to have been in Marsh? This concession is not to be regarded as working an estoppel upon defendant, so as to preclude him from showing that he had acquired a better title than that which he had derived from Marsh; nor was it so treated in this case, for evidence was heard in his behalf designed for that purpose. The difficulty was, that he did not prove the acquisition, by himself, of such better title; he only raised a doubt as to where the real, paramount, legal title was. Considering the relation which these parties bore to each other touching a title, good as to the one or the other of them, in this contest, that was not enough, especially where the defendant has gained the possession of the premises under a title which he would repudiate. For it will be found, and may be remarked as matter of illustration, that where the doctrine of estoppel (call it equitable or common-law doctrine) applies restraint to a tenant in favor of a landlord, it is far more stringent, in view of English and American courts, where the tenant would impute defects in the landlord's title existing when he entered, and those arising subsequently, though he agreed to hold the premises, already in possession, under the landlord.

Upon the question, which had the better right to the title claimed by each, the defendant showed that Gary acquired the first conveyance from the sheriff, Martin acquired a conveyance subsequently from the same quarter. Without more, this must have placed the defendant on the vantage-ground. But the plaintiff imputed fraud to the sale by the sheriff to Gary, founded on the fact that the sheriff sold under a junior *fi. fa.* in favor of Gary, who attended, and presenting a mortgage from Marsh to himself, of the premises under sale, said that "the sale was made to complete the title." The jury, applying the standard prescribed to them, "that all sales at auction should be open to full and free competition," and that a purchaser must do no act, "the effect of which was to destroy this fair competition," have affirmed that Gary's conduct did contravene such rule of law, and did vitiate the sale by the sheriff to himself. In this they differed from an opinion expressed by the presiding judge in the report, but whether to the jury is not stated.

Without undertaking to form any opinion ourselves upon the

fact, in the present case we must allow that when such a question does arise in a cause, there is no other arbitrament to which it can be submitted but that of the jury. They have been satisfied, in the present instance, by the considerations, that a mortgagee of the premises presented himself at a sheriff's sale, where the rule of *caveat emptor* prevails, with mortgage in hand; proclaimed that the sale was made to complete title; that this can be accomplished only (so far as mortgagee is concerned) in case his mortgage be of date prior to any judgment in favor of another against the mortgagor; that the proclamation naturally imported that such was the case; that such was not in fact the case; that the absolute estate of Marsh was properly on sale, and is now claimed to have been sold, whereas the equity of redemption alone was represented to be on sale, and so represented by the purchaser at that sale, and his representation was adopted by the sheriff, at least not repudiated or corrected. We would not venture so far to trench upon the province of the legal triers of fact as to reverse such their decision.

It has been suggested, however, at the bar (and the idea has attracted attention in this court), that there is inconvenience and danger of serious mischief in entertaining an action of trespass to try title, by a subsequent against a prior purchaser of the same land, from the same sheriff, sold as the property of the same defendant in executions, which are existing and in force at either sale—until, by proceedings in equity, the prior sale shall have been declared void and set aside. It is suggested that the question of fraud, when presented collaterally, may not be thoroughly sifted; that a mere mistake of opinion, expressed with no dishonest end, may be confounded with the utterance of a corrupt falsehood, with deliberate purpose of deception; that all this may be imputed to a casual observation, when no one regarded or acted on it; that if such conduct as Gary's "chilled" the sale, such as the plaintiff's can have no less effect, since property is pushed under the hammer for the second time, under most forbidding difficulties and a cloud of doubt, and a purchaser must be bold enough to make up his mind to unavoidable litigation; that under such circumstances both debtor and creditors are subjected to forfeiture; that finally, a high equity may be submitted to a law tribunal. There is force in such views. In many cases they must be very potent; yet it may be answered, that creditor or debtor in execution may resort to equity, and, as we suppose, restrain all other proceedings until the remedy may be exhausted in that

jurisdiction. Besides, cases may perhaps arise in a form and under circumstances which we could not exclude from this forum, upon any ground of convenience or of law. Suppose a decree for twenty-five dollars should exist against a land owner, and the plaintiff in execution should cause a palpably fraudulent sale of his land for one fiftieth of its value, buy it himself, and take possession, could we exclude a *bona fide* purchaser from defendant in execution for the full value of his land from his action, simply because he had to travel over such a prior sale, and extinguish it, when he could do so by the most overwhelming evidence of fraud? Such and like cases might be conceived, as to realty or personality, where the expenses of litigating in chancery might prove a very formidable obstacle to the course of justice; and it can not be maintained that a question of fraud at a sheriff's sale, or in other forms, is not cognizable at law.

At any rate, just such a case as this, presenting the same question in the same form of action, and decided in the same way, went before the jury at Union; and their finding of fraud in the sheriff's sale, though not in accordance with the opinion expressed to them by the circuit judge, was sustained by the court of appeals at Columbia: *Keenan v. Pearson*, MS., May term, 1830.

The objection set down to the admission of evidence on the part of the plaintiff having been abandoned here, and the considerations hereinbefore directed to the other grounds of appeal, satisfying this court that the defendant should take nothing by his motions, the same are therefore dismissed.

O'NEALL, EVANS, FROST, and WHITNER, JJ., concurred.

Motions dismissed.

WHAT TITLE MUST BE SHOWN IN TRESPASS TO TRY TITLE: See *Bank of S. C. v. South Carolina etc. Co.*, 49 Am. Dec. 640, and note.

PURCHASER FRAUDULENTLY PREVENTING COMPETITION AT SHERIFF'S SALE, EFFECT OF: See *Foulk v. McFarlane*, 37 Am. Dec. 467; *Stovall v. Farmers' etc. Bank*, 47 Id. 85; *Trimble v. Turner*, 53 Id. 90; *Byers v. Fowler*, 54 Id. 271; *Kinard v. Hiers*, 55 Id. 643, and cases cited in the notes thereto.

BRAXTON v. FREEMAN.

[*6 Richardson's Law, 35.*]

WIFE'S DOWER IN LANDS ALIENED
to her of all her husband's property during her life or widowhood, though
the devise is accepted.

By HUSBAND IS NOT BARRED BY DEVISE

INTENT THAT WIFE'S DOWER SHALL BE BARRED BY ACCEPTANCE OF PROVISION under the husband's will must appear in the will by express words or necessary implication.

DEMAND of dower in certain lands aliened by the defendant's husband during coverture. The defendant pleaded, among other defenses, that the defendant had elected to take a provision under her husband's will in lieu of dower, and it was shown that the husband had devised to the defendant during life or widowhood all his real and personal estate, and that since his death she had received and was now enjoying the same. The court held that a gift of part of the husband's estate would not be construed to be in lieu of dower unless expressly declared to be so, but that a gift of the whole necessarily implied that it was in lieu of dower, and the acceptance was a bar, and nonsuited the defendant. Appeal and motion to set aside the nonsuit.

Bellinger, for the motion.

Owens, contra.

By Court, WARDLAW, J. The gift made by a husband's will to his wife, either for life or in fee, of everything that he owned at his death, apart from a distinct manifestation of a contrary intention, would be construed a benevolence; the acceptance of it would by necessity exclude her demand of dower in the lands contained in the gift, for she could not demand against herself: Shep. Touch. 328; *Caston v. Caston*, 2 Rich. Eq. 2; but it would affect her right of dower in other lands which the husband had aliened during coverture no more than it would affect her right in a chose in action or any other thing to which she was entitled independent of the husband's will: *Cunningham v. Shannon*, Eq. MSS. H. 407; *Hitchens v. Hitchens*, 2 Vern. 403; *Adsit v. Adsit*, 2 Johns. Ch. 448 [7 Am. Dec. 539]; and other cases cited in the dissenting opinion of Chancellor Dargan in *Bailey v. Boyce*, 4 Stroh. Eq. 92.

It has been suggested here that the devise of the remainder after the wife's life estate would be diminished and disturbed by the damages which the defendant, husband's vendee, would recover from the husband's executors for the breach of warranty that would be made by the wife's recovery of dower in the lands conveyed to the defendant; that thence arises an implication in the will that the provision therein made for the wife should be in lieu of dower; and that her acceptance of it has barred her present demand. Admitting that there was a warranty, and

that the remainder will be diminished as has been suggested, the result at last will be that the remainder will be less valuable than had been expected—that the testator was worth less than the remaindermen had hoped. The dower disturbs just as a debt of the testator would do. As a devise to a creditor would not of itself prevent his taking both his debt and devise, so a devise to a wife does not of itself have any effect upon her dower, which is no more subject to the disposition of a testator than is his debt. The right to either debt or dower may be extinguished by the acceptance of something which has been given for the purpose of satisfying it; but such purpose, in a husband's will, when it is urged against dower, must appear by express words or necessary implication.

Motion granted.

O'NEALL, WITHERS, and WHITNER, JJ., concurred.

Motion granted.

WIFE'S DOWEE BARRED BY PROVISION IN HUSBAND'S WILL, when and when not: See *Borland v. Nichols*, 51 Am. Dec. 576; *Melizet's Appeal*, 55 Id. 573, and cases cited in the notes thereto.

BLEDSOE v. THOMPSON.

[6 RICHARDSON'S LAW, 44.]

GAMING TRANSACTIONS ARE VIEWED WITH STRONGER CONDEMNATION by the courts of South Carolina than by the English courts.

Losser may recover from Stake-holder Money Bet by him on a horse-race, on demanding it before it is paid over.

ASSUMPSIT to recover money deposited by the plaintiff with the defendant as stake-holder as a wager on a horse-race. The wager was decided against the plaintiff, but he gave notice to the defendant not to pay the money over, but the defendant nevertheless did so. Verdict for the plaintiff, under the instructions of the court. Appeal, and motion for a new trial, on the ground that the plaintiff had no cause of action.

A. P. Aldrich, for the motion.

Owens, contra.

By Court, WITHERS, J. We shall enter upon no review of our own or of other cases, which a view to say what this case might suggest, but what is necessary to its determination. It is safe to observe that the state look with a

stronger spirit of condemnation upon every class of cases involving gaming transactions than have the English courts upon some of them; and this will appear from what is contained in the case of *Rice v. Gist*, 1 Stroh. L. 82.

The money which Bledsoe sued for he had deposited with Thompson as a wager upon a horse-race. He lost the race, but directed Thompson not to pay the money over. The winner had no legal right to it: his action for it could not have been sustained, whether directed against Thompson, the stake-holder, or against Bledsoe. Why could not the latter countermand any previous authority that might have been communicated to Thompson? It was not a case in which Thompson held an agency coupled with an interest in himself; nor one in which Thompson had incurred a liability, the discharge of which required that he should pay the deposit to the winner; nor one in which any right of a third party cognizable by the law demanded that Thompson's trust or agency should be regarded irrevocable; nor one in which two principals had mutually constituted a common agent, the entire fulfillment of whose agency as originally defined had become necessary to vindicate the supervening legal rights of either of the two; nor one in which legal rights of a third person had arisen upon a partial execution of an agency created by Bledsoe. It is a case in which the defendant held for the plaintiff an illegal wager (one at least which the law does not sanction, though an indictment might not lie); and in such case we have the opinion of the English court that either party, even the loser, may recover from the stake-holder the money deposited by him, whether the wager or event be decided or not; provided he demand his money before the same be actually paid over, after the event, to the winner: *Hastelow v. Jackson*, 15 Eng. Com. L. 117. Without, therefore, prosecuting the inquiry into any other grounds that might be discussed in such a case as this, the foregoing considerations have brought us to affirm the conclusion on the circuit and to adjudge that the motion be refused. And it is ordered accordingly.

O'NEALL, WARDLAW, FROST, and WHITNER, JJ., concurred.

Motion refused.

MONEY DEPOSITED ON WAGER MAY BE RECOVERED BACK FROM STAKE-HOLDER, when and when not: See *Shackleford v. Ward*, 36 Am. Dec. 435; *Jeffrey v. Ficklin*, Id. 456; *Stacy v. Foss*, Id. 755; *Dauterive v. Broussard*, 39 Id. 550; *Bates v. Lancaster*, 51 Id. 696, and cases cited in the notes thereto.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

BRIGANCE v. ERWIN'S LESSEE.

(1 SWAN, 875.)

LEVY OR EXECUTION ON LAND MUST CONTAIN SUCH GENERAL DESCRIPTION as will, by reasonable intendment, connect it with the sale and deed, so that purchasers may know the land to be sold, and form some estimate of its value, and that the sheriff or marshal making the sale, or his successor, looking to the levy, may know what land to convey, and not sell one tract and convey another.

IT MUST APPEAR FROM LEVY OR EXECUTION ON LAND, and from sheriff's deed, that the land named in each is the same.

PAROL EVIDENCE, EXCEPT IN CASE OF LATENT AMBIGUITY, IS IN GENERAL INADMISSIBLE to show the identity of land levied on under execution.

LEVY INDORSED ON EXECUTION IS VOID FOR UNCERTAINTY IN DESCRIPTION of land levied on, if in the words: "Levied, twentieth August, 1825, on nineteen hundred and fifty acres of land, in Henderson county, part of a tract of two thousand five hundred acres located by Daniel Gilchrist," and sale thereon vests no title in the purchaser.

THERE IS NO PRESUMPTION THAT ENTRY ON LAND LEVIED ON was made in debtor's name, in the absence of any statement in the levy to that effect, for he may be a purchaser as well as an enterer.

EJECTMENT. Judgment for the plaintiff, and the defendant brought error. The opinion stated the case.

Bullock and Scurlock, for the plaintiff in error.

M. and H. Brown, for the defendant in error.

By Court, TOTTEN, J. The action is ejectment in the circuit court of Henderson for one thousand nine hundred and fifty acres of land. At July term, 1851, of said court, there was a trial, which resulted in a judgment for the plaintiff, and the defendant has appealed in error.

James Erwin, the plaintiff's lessor, claims title under a marshal's sale, made November 12, 1825, in virtue of an execution issued by the circuit court of the United States at Nashville, on a judgment in that court in favor of the *Bank of Georgia v. Andrew Erwin*. The marshal's deed and the record of that proceeding were produced at that trial. The levy indorsed on the execution is in these words: "Levied, twentieth August, 1825, on nineteen hundred and fifty acres of land, in Henderson county, part of a tract of two thousand five hundred acres located by Daniel Gilchrist." The description contained in the marshal's deed is in the words of the levy, and no more. And now the only question is, whether an execution sale made in virtue of such a levy is valid or not.

The rule to be deduced from the cases on this subject seems to be, that the levy must contain such general description as will, by reasonable intendment, connect it with the sale and deed, so that purchasers may know the land to be sold, and form some estimate of its value, and that the sheriff or marshal making the sale, or his successor, looking to the levy, may know what land to convey, and not sell one tract and convey another: *Parker v. Swan*, 1 Humph. 81 [34 Am. Dec. 619]; *Gibbs v. Thompson*, 7 Id. 180.

The notice, founded on the levy, is supposed to contain the same description, and purchasers are thereby directed to the land intended to be sold. The deed, also founded on the levy, contains a more full and special description, consistent, however, with that contained in the levy, and it must appear from the levy and the deed that the land named in each is the same, for parol evidence, except in the case of latent ambiguity, is, in general, inadmissible to show the identity of the land. Thus, in *Taylor v. Cozart*, 4 Humph. 434 [40 Am. Dec. 655], it was held that a notice, being a matter *in pais*, was inadmissible to aid a defective levy.

The levy may contain, in itself, the degree of certainty required, and that is the better practice; but if it refer to a deed or other title paper of record, to which convenient access may be had, it thereby incorporates in itself the description contained in the deed or title paper referred to. So, the levy may have the requisite certainty, by reference to natural or artificial objects on the land, or to adjoining lands.

In the cases that have occurred, the following levies were held to be bad: "Levied on eight thousand acres of land, lying in four different tracts, in the county of Stewart:" *Pound v.*

Pullen, 3 Yerg. 338. "Levied on three tracts of land, one tract containing three hundred acres, one tract containing forty or fifty acres, one other tract containing one hundred and ten acres, as the property of Haywood Cozart, all in the county of Carroll;" *Taylor v. Cosart*, 4 Humph. 434 [40 Am. Dec. 655]. "Levied on lot No. —, in the town of Greenville, with its improvements;" *Brown v. Dickson*, 2 Id. 396 [37 Am. Dec. 560].

But in *Parker v. Swan*, 1 Humph. 84 [34 Am. Dec. 619], the description was: Levied on "John Doak's seventy acres of land, on the waters of the west fork of Stone's river," and the levy was held to be good. As to this levy, it is to be observed that the county will be inferred from the fact that the levy was made by the sheriff of Rutherford: *Pound v. Pullen*, *supra*; *Brown v. Dickson*, *supra*. It states, then, the owner of the land, the number of acres, its location, that is, on the waters of the west fork of Stone's river, in the county of Rutherford. But, without intending to disturb its authority, it must be regarded as going to the utmost limit admissible under the rule before stated.

Now, in view of the rule and the cases referred to, how is the levy in the present case to be considered?

It is evident that if the words "located by Thomas Gilchrist" be omitted, the levy would be bad. Do those words give it such certainty as to make it good? The location or entry being the inception of the title and a matter of record if it were referred to and identified by the levy with reasonable certainty, it would become a part of the levy and be taken in aid of its description. But we think it is not sufficiently identified for that purpose. It does not appear in whose name the location was made, or in what name and section, or in what part of the county the land was located. The name of the owner is the most material fact omitted in the description, in the absence of which, it should otherwise have a reasonable certainty.

Could persons desirous to purchase ascertain with any convenience and certainty the locality and identity of land intended to be sold under this description? And how is a description in the marshal's deed, if it were perfect, as it is not, to be connected with that contained in the levy, so as to identify the one with the other without the aid of extrinsic proof?

It would require parol evidence to show negatively that Gilchrist located but the one tract containing two thousand five hundred acres, from which it might be inferred that that was the tract intended to be sold; and if that were not the fact, then the description would become still more vague and uncertain.

But we have seen that titles held under judicial sales can not depend upon evidence of this description for their validity.

We may further observe that it is not to be presumed as a fact, in the absence of any statement in the levy to that effect, that the entry was made in the name of the debtor, for he may be a purchaser as well as an enterer.

The levy is not aided in the present case by the description contained in the deed, for it is the same as that in the levy, and no more.

We consider that the levy was void for uncertainty, and that the marshal's sale communicated no title to the purchaser.

His honor, the circuit judge, having considered otherwise, his judgment will be reversed, and the cause remanded for a new trial.

SUFFICIENCY OF DESCRIPTION OF LAND IN LEVY, or return of execution, or in sheriff's deed: See *Huddleston v. Reynolds' Lessee*, 50 Am. Dec. 702, and note collecting the prior cases in this series. See also, as to description of shares of stock levied on, *Princeton Bank v. Crozier*, 53 Id. 254.

CONCLUSIVENESS OF OFFICER'S RETURN, AND ADMISSIBILITY OF PAROL EVIDENCE TO VARY: See cases cited in the note to *Dwinel v. Soper*, 52 Am. Dec. 645; see also *Shotwell v. Hamblin*, 55 Id. 83; *Swan v. Parker*, 27 Id. 522; *Webb v. Bumpass*, 33 Id. 310; *McClelland v. Slingluff*, 42 Id. 224.

BARHAM v. TURBEVILLE.

[1 SWAN, 437.]

PURCHASER'S TITLE TO SLAVE, PURCHASED DURING OWNER'S INFANCY from one having no title, can not be disputed, at law or in equity, by infant, when he has reached his majority, if, having full knowledge of his rights, and possessing such discretion and intelligence as enable him to comprehend the import and effect of his conduct, he stood by and encouraged the sale, whereby the purchaser was induced to purchase, under the impression that the title was good.

PERSON MAY BE ESTOPPED BY MATTER IN PAIS as well as by record and by deed.

INFANT IS ESTOPPED BY HIS ACTUAL AND POSITIVE FRAUD, at law as well as in equity, from attacking the title of an innocent purchaser.

ACTUAL AND POSITIVE FRAUD OF INFANT CAN BE COMMITTED ONLY BY SOME UNEQUIVOCAL ACT, and not merely inferred by his silence or acquiescence, and it should appear that he had full knowledge of his rights, and that he possessed such discretion and intelligence as to enable him to comprehend the import and effect of his conduct in reference to his rights, as in the case of adults.

TROVER for the conversion of a slave. Judgment was for the plaintiffs, and the defendant brought error.

L. M. Jones and Morrill, for the plaintiff in error.

Hawkins, for the defendants in error.

By Court, TOTTEN, J. The action is trover, in the circuit court of Carroll, by Samuel F. Turbeville and others against Timothy Barham for the conversion of a negro slave to which the plaintiffs claim title. At the September term, 1851, of said court, there was judgment for the plaintiffs for six hundred and ninety-three dollars, and the defendant appealed in error to this court.

It appears that in 1849 the defendant Barham purchased said slave of Ansel H. Turbeville, the father of the plaintiffs, and under him claims absolute title and ownership.

But it is very clear that Ansel H. Turbeville, the father, had no title. The title was in his children, derived by them from a third person, that is, from their maternal ancestor, Elizabeth McKinney, some time about 1840, in the state of Louisiana, where the Turbeville family then resided. By order of the probate court of the parish of Baton Rouge, in June, 1840, the said Ansel was appointed tutor to his said children, and from that time forward held possession of their slaves so derived, the slave in question being one of them.

In 1843, he, with his children and said slaves, removed from Louisiana to Tennessee, first to the county of Henry, and then, in the early part of 1844, to Carroll, where, in 1849, he sold the slave in question to defendant Barham. The said Ansel spoke of the slaves and used them as his own, and it seems that they were generally so considered; though there were some intimations that the title was in his children.

In June, 1849, the said Ansel died, and afterwards, in December, his children instituted this suit.

At the time of said sale to Barham, Samuel F., one of the plaintiffs, was about twenty years of age; the other children were under that age.

The defendant offered to prove at the trial, by Thomas, a witness, that when the slave was sold to defendant, two of the plaintiffs, Samuel and another, knew of their title and concealed it from defendant; that they stated to defendant that their father's title was valid, and that they had no title; that they encouraged defendant to buy, and consented to the sale.

This evidence, being objected to, was ruled out by the court, and the question to be decided is, Was it legally competent?

It is very clear that in the view of a court of equity, evidence of this kind would be deemed competent.

For if a man having title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale, and thereby another person is induced to purchase the estate, under the impression that the title is good, the former, so acting, will be bound by the sale; and neither he nor his privies will be at liberty to dispute the validity of the vendee's title: *Storrs v. Barker*, 6 Johns. Ch. 169 [10 Am. Dec. 316]; *Wendell v. Van Rensselaer*, 1 Id. 354; 1 Story's Eq. Jur., sec. 385.

This doctrine, indeed, goes still further, and demands that the true owner shall speak out and forbid the sale. But the case we have supposed is one of positive and actual fraud; and in such case, neither infancy nor coverture will constitute any excuse for the guilty party—"for neither infants nor *femes covert* are privileged to practice deception or cheats upon other innocent persons:" 1 Story's Eq. Jur., sec. 385; *Nicholson v. Hooper*, 4 Myl. & Cr. 179; *Pickard v. Sears*, 6 Ad. & El. 474. So in Sugden on Vendors, 262, it is said if a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although *covert* or under age.

Now, does this doctrine apply in an action for personal property in a court of law?

A person may be estopped by matter *in pais*, as well as by record and by deed; 4 Com. Dig., Estoppel; 2 Phill. Ev., Cowen & Hill's note 192.

In *Pickard v. Sears*, 6 Ad. & El. 474, which was trover for machinery and other articles, it appeared that the plaintiff had the legal title, but gave no notice of his claim, at the time the defendant became the purchaser, though present and informed that the goods were to be sold. It was held that the plaintiff was not entitled to recover. In this case, Lord Denman, C. J., delivering the opinion of the court, said: "The rule of law is clear, that where one by words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That is, the party making the admission is in such case estopped from disputing the fact admitted.

In *Heane v. Rogers*, 9 Barn. & Cress. 577, which was an action of trover, the same principle is stated and recognized.

So, upon the same principle, it was held that the acceptor of a bill can not set up as a defense that the name of the drawer was forged; because the bill obtained currency and credit on the faith of his acceptance: *Sanderson v. Collman*, 4 Man. & G. 209.

So a tenant shall not be permitted to dispute the title of the person under whom he entered; and in an action against him to recover the possession, the plaintiff shall recover in virtue of the estoppel merely.

The same principle is conceded and illustrated in many other cases: *Watson v. Wace*, 5 Barn. & Cress. 153; *Langford v. Foul*. 2 Moo. & S. 349; *Mace v. Cadell*, 1 Cowp. 232; *Bathews v. Gu-lindo*, 1 Moo. & P. 565.

In view of these authorities, as well as upon principle, it seems to us that in cases of actual fraud the principle of estoppel should apply at law as well as in equity, in the circumstances before stated, to protect the title of an innocent purchaser against the action of the party who perpetrated the fraud.

This rule, as we have seen, applies to infants as well as to adults—for infancy is no privilege to perpetrate frauds upon the rights of innocent persons with impunity.

But to hold the infant bound by his act or admission, it should appear to be a case of actual and positive fraud, committed by some unequivocal act, and not merely inferred by his silence or acquiescence. It should also appear that he had full knowledge of his rights, and was not in a state of ignorance or misapprehension in regard to them; and that he possessed such discretion and intelligence as to enable him to comprehend the import and effect of his conduct in reference to his rights, as in the case of adults.

These are, indeed, necessary elements of the actual and positive fraud, by which he may be precluded and estopped from asserting a right to the prejudice of an innocent purchaser, who has been influenced by his conduct.

Now, to apply this principle to the case before us, it will be seen that the evidence is competent, so far as it has a tendency to make out a case of actual and positive fraud, as before stated.

The judgment of the circuit court will be reversed, and the cause remanded for a new trial.

ESTOPPEL IN PAIS, WHAT CONSTITUTES: See *Taylor v. Zepp*, 55 Am. Dec. 113, and note citing prior cases; *Hughes v. McAllister*, Id. 143; *McCravey v. Remson*, 54 Id. 194. Acts and admissions acted upon by others are an estoppel upon the person performing the acts or making the admissions; and

the estoppel may very well be enforced in a court of law. The principal case is cited to this point in *Spears v. Walker*, 1 Head, 169.

ESTOPPEL IN PARS AS APPLIED TO INFANTS: See extensive note to *Norris v. Wait*, 44 Am. Dec. 285. See also *McCoon v. Smith*, 33 Id. 623; *Burley v. Russell*, 34 Id. 146, and note. The principal case is cited to the point that the doctrine of estoppel in pars applies to an infant if he has discretion and intelligence sufficient to understand the import and effect of his act or admission, in *Ferguson v. Hamilton*, 35 Barb. 438. But in *Parker v. Hall*, 2 Head, 646, it is held, citing the principal case, that an infant *cestui que trust* will not be estopped by the act of his trustee if he himself exhibit no fraud or other act of estoppel. In *Pilcher v. Smith*, Id. 211, the principal case is cited to the point that the disability of coverture or of infancy carries with it no license or privilege to practice fraud or deception upon innocent persons.

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1. ACKNOWLEDGMENT BY MARRIED WOMAN of deed or instrument should state that the same had been made separate and apart from her husband, and that she was examined privately touching the same. *Warren v. Brown*, 191.
2. CERTIFICATE OF ACKNOWLEDGMENT IS OF NO VALUE AS TO FACT STATED in it if the law did not intrust the officer to certify to this fact. *Draper v. Bryson*, 257.

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1. **ADVERSE POSSESSION IS NOT MADE LESS HOSTILE TO TRUE TITLE, NOR IS A TITLE ALREADY COMPLETE UNDER THE STATUTE OF LIMITATIONS DIVESTED, BY THE MERE PURCHASE OF AN OUTSTANDING INVALID CLAIM TO THE LAND.** *Owen v. Myers*, 693.
2. **TWENTY-ONE YEARS IS TIME WHICH RAISES PRESUMPTION WHICH WILL ACT AS AN INTEREST IN LAND, AND THIS PRESUMPTION UNREPelled WILL DEFEAT ANY CLAIM THAT IS SET UP AGAINST IT.** *Strimpfer v. Roberts*, 606.
3. **ADVERSE AND EXCLUSIVE POSSESSION FOR TWENTY YEARS IS GOOD BAR TO A WRIT OF ENTRY, ALTHOUGH THE DEMANDANT'S TITLE MAY HAVE BEEN DERIVED THROUGH MEANE CONVEYANCES FROM THE TENANT.** *Stearns v. Henderson*, 65.
4. **DECLARATION OF GRANTEE OF LAND MADE MORE THAN TWENTY YEARS BEFORE THE COMMENCEMENT OF AN ACTION FOR THE RECOVERY OF THE LAND, WHERE THE DEFENSE RELIED ON IS AN ADVERSE AND EXCLUSIVE POSSESSION FOR A PERIOD SUFFICIENT TO CONSTITUTE A BAR UNDER THE STATUTE OF LIMITATIONS, THAT THE ENTIRE TITLE TO THE PREMISES WAS, AT THE DATE OF SUCH DECLARATION, IN THE TENANT IN SUCH ACTION, IS ADMISSIBLE IN EVIDENCE UPON THE QUESTION OF ADVERSE POSSESSION IN THE TENANT UNDER A CLAIM OF RIGHT.** BUT DECLARATIONS OF SUCH GRANTEE, MADE AFTER HIS INSOLVENCY AND THE CONVEYANCE OF HIS INTEREST IN THE PREMISES TO AN ASSIGNEE, AND AFTER TWENTY YEARS' ADVERSE POSSESSION BY THE TENANT, ARE NOT ADMISSIBLE. *Id.*

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1. **RULE THAT ACTS OF AGENT AFTER PRINCIPAL'S DEATH ARE INVALID** APPLIES TO THOSE ACTS WHICH MUST BE DONE IN THE NAME OF THE PRINCIPAL, AND NOT TO THOSE ACTS NOT REQUIRED TO BE DONE IN THE NAME OF THE PRINCIPAL;

- and such acts, if none of the parties had notice of the principal's death, are binding. *Dick v. Page*, 267.
2. CONTRACT WITH AGENT IS CONTRACT WITH PRINCIPAL when made about the matter to which the agency relates. The contracting party is not bound by secret limitations of the agent's authority, of which he has no notice. *Chouteaux v. Leech*, 602.
3. PRINCIPALS CAN NOT CLEAR THEMSELVES FROM RESPONSIBILITY for the acts of their agents by showing that they authorized the act done, but did not intend that its legal consequence should follow. *Id.*
4. RULE THAT AGENT IS EXCLUDED FROM PURCHASING PROPERTY OF HIS PRINCIPAL is founded upon the principle that the law will not permit a man to act in the double capacity of principal and agent. *Dwight v. Blackmar*, 130.
5. AGENT DECEITFULLY TOLD PRINCIPAL THAT HE HAD NOT TAKEN NOTE from a debtor to the principal; but in the principal's action for the debt the debtor successfully defended by proof that the agent had accepted his note. *Held*, that the agent was liable to the principal for deceit. *White v. Merrill*, 527.
6. AGENT ACTING UNDER PAROL AUTHORITY IS COMPETENT WITNESS to prove his own agency. *Gould v. Norfolk Lead Co.*, 50.
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1. **DEBTOR MAY GIVE PREFERENCE TO PARTICULAR CREDITOR**, or set of creditors, and an assignment or payment for that purpose will be valid, when the same has not been done to secure the property to himself. *Kuykendall v. McDonald*, 212.
2. **ASSIGNMENT FOR BENEFIT OF CREDITORS, GIVING TRUSTEE DISCRETIONARY POWER TO SELL ON CREDIT**, is void, because it tends to delay creditors by embarrassing their right to have an immediate conversion of the property into cash. *Nicholson v. Leavitt*, 499.
3. **INTENT TO HINDER AND DELAY CREDITORS BY ASSIGNMENT** for the benefit of creditors renders it fraudulent and void, but not so merely incidental delay. *Id.*
4. **ASSIGNMENT FOR BENEFIT OF CREDITORS CAN NOT EXEMPT** the assignee from the obligation to use ordinary care; a provision that he shall be liable only for his own gross negligence or willful misfeasance renders the instrument void. *Lichfield v. White*, 534.

ASSIGNMENT OF CONTRACTS.

1. **ASSIGNMENT OF DEMAND TO GROW DUE IN FUTURE**; here, of money to be earned by performance of a contract for work and materials, though it can not operate immediately, becomes operative in equity when the subject-matter becomes existent or due. *Field v. Mayor*, 435.
2. **ASSIGNMENTS OF CONTINGENT INTERESTS AND EXPECTATIONS**, and of things having no present actual existence, but resting in possibility only, are valid in equity if fairly made and not opposed to any rule of public policy. *Id.*
3. **DEBTOR WHO WITHOUT NOTICE OF ASSIGNMENT OF DEBT PAYS IT** to his creditor will be protected as against the latter's assignee. *Richards v. Griggs*, 240.
4. **BLANK INDORSEMENT, ACCOMPANIED BY DELIVERY**, is SUFFICIENT AS ASSIGNMENT of a non-negotiable note. *Tibbets v. Gerrish*, 307.
5. **PERSONS THROUGH WHOSE HANDS NON-NEGOTIABLE NOTE HAS PASSED** need not be noticed by assignee in declaring on it, unless their names appear upon it as indorsers or assignors. *Id.*

6. CONSIDERATION BETWEEN ASSIGNOR AND ASSIGNEE NEED NOT BE PROVED in an action by the assignee against the maker of a non-negotiable note, and a formal statement of it in the declaration is sufficient. *Id.*
 7. ASSIGNEE OF NON-NEGOTIABLE NOTE MAY MAINTAIN SUIT THEREON IN ASSIGNOR'S NAME. *Id.*
 8. EXPRESS PROMISE BY MAKER TO PAY ASSIGNEE OF NON-NEGOTIABLE NOTE enables assignee to maintain action in his own name against the maker. *Id.*
 9. EVIDENCE THAT MAKER OF NON-NEGOTIABLE NOTE PROMISED to pay it to the assignee if he signed it is competent evidence to show an express promise to pay to the assignee, the maker's signature having been proved or admitted. *Id.*
 10. BILL IN EQUITY MAY BE MAINTAINED BY ASSIGNEE OF PART only of a demand, especially where there have been other assignments of other parts of the same demand to other persons. *Field v. Mayor*, 435.
 11. MAKER OF NOTE MAY MAKE SAME DEFENSE AGAINST ASSIGNEE that he might have made against the assignor or payee. *Smith v. Busby*, 207.
- See ATTACHMENTS, 4; JUDGMENTS, 2; LICENSES, 1; MORTGAGES, 1; NEGOTIABLE INSTRUMENTS, 17.

ASSUMPSIT.

1. ACTION FOR BREACH OF SPECIAL CONTRACT must, in general, be on the special contract while it is open and unperformed; and no action of *assumpsit* for anything done under it can be brought. *Winstead v. Reid*, 571.
 2. COUNT FOR MONEY HAD AND RECEIVED CAN NOT BE SUSTAINED by note payable in specific articles; but it may be declared upon specially, as upon a negotiable cash note. *Tibbets v. Gerrish*, 307.
- See CONTRIBUTION, 2.

ATTACHMENTS.

1. ATTACHING CREDITOR HAS SUCH LIEN UPON GOODS ATTACHED as a court of equity will recognize in order to investigate whether a conveyance was fraudulent, or a confession of judgment not made in good faith, where such conveyance or confession affected the property attached. *Hunt v. Field*, 365.
2. BILL BY ATTACHING CREDITOR TO HAVE CONVEYANCE AND CONFESSION OF JUDGMENT SET ASIDE as fraudulent may be joined in by other creditors of the defendant who contribute to the expenses of the suit, and must show for what the attachment was issued, that it was executed, and upon what property, and the defendant in attachment must be made a party to the suit. *Id.*
3. ADMINISTRATOR MAY BE GARNISHED FOR SUM IN HIS HANDS, which, on a settlement, he has been adjudged to pay over. *Richards v. Griggs*, 240.
4. ADMINISTRATOR GARNISHED FOR SUM OF MONEY he has been ordered to pay over, and suffering judgment to be rendered against him, being ignorant of the fact that it has been assigned from a want of notice of the assignment, will be protected. *Id.*
5. GARNISHEE MUST BE ALLOWED RIGHTS OF ANY OTHER PARTY in court to make such defense as the law allows him against the party seeking to charge him with a liability. *Webb v. Miller*, 189.

6. ON REVEREAL OF JUDGMENT DISCHARGING GARNISHEE, the latter should be allowed to file an amended answer, setting forth the payment of the debt by him to his creditor, after the judgment of discharge, and before the writ of error was sued out. *Id.*
7. ON JUDGMENT OF DISCHARGE OF GARNISHEE, if he could make no defense against the claim of his creditor in law or in equity, and his judgment could be enforced by legal process, he can make a voluntary payment of it to the creditor, and he can not resist payment on the ground of a mere possibility that a writ of error might be prosecuted to the judgment discharging him. *Id.*
8. ONE OR TWO OR MORE JOINT OR JOINT AND SEVERAL DEBTORS CAN NOT BE CHARGED as a trustee unless the others are joined with him in the process, as a general rule. *Ladd v. Baker*, 355.
9. ONE OR TWO OR MORE JOINT OR JOINT AND SEVERAL DEBTORS MAY BE CHARGED as trustee on a trustee process against him severally when it appears that he will not remain liable to pay the debt or any part of it a second time. *Id.*
10. ONE OR MAKERS OF PROMISSORY NOTE MAY BE CHARGED AS TRUSTEE on process against him separately, when one of the plaintiffs is the other maker and signed as surety. *Id.*
11. DEATH OF PLAINTIFF BEFORE JUDGMENT AGAINST GARNISHEE IS RENDERED does not render such judgment null and void. *Coleman v. McAnulty*, 229.
12. JUDGMENT IN ATTACHMENT SUIT CAN NOT BE COLLATERALLY IMPEACHED by showing that the plaintiff at the time of the issuing of the attachment was not a creditor of the defendants. *Harrison v. Pender*, 573.
13. JUDGMENT IN ATTACHMENT IS PLACED ON SAME FOOTING WITH ONE RENDERED IN COURT OF RECORD, according to the course of the common law. It can not be collaterally impeached by evidence or by plea, except by a plea denying the existence of the record, and is conclusive until set aside by the same court, or reversed by a writ of error or on appeal by a superior tribunal. *Id.*
14. OBLIGEE IN BOND MAY MAINTAIN ACTION FOR BENEFIT OF OTHERS for whose indemnity the bond was given. Consequently the obligee in an attachment bond may maintain an action on it for the benefit of a garnishee when the attachment was dissolved, the suit dismissed, and the garnishee discharged. *Barnes v. Webster*, 232.
15. ATTACHMENT BOND THOUGH VOLUNTARY AND NOT AUTHORIZED by any statute is good as a common-law bond; all bonds though voluntary, if they do not contravene public policy, nor violate any statute, are valid and binding on the parties to them. *Id.*
16. ATTACHMENT BOND EXECUTED TO UNITED STATES IS VALID in a suit between individuals; and in such a case, the acceptance of the bond is presumed although there is no law authorizing the officer to take it. *Id.*

See PARTNERSHIP, 3; RECEIVERS, 1.

ATTORNEYMENT.

See STATUTE OF FRAUDS, 3.

AUCTIONS.

RESCISSON OF SALE OF LAND PURCHASED AT AUCTION SALE, ON GROUND OF BY-BIDDING, will not be granted where the grantees did not file their

bill for a rescission till a year and six months after the discovery of the by-bidding. *McDowell v. Simms*, 595.

AUDITORS.

See NEGOTIABLE INSTRUMENTS, 18.

BAILMENTS.

1. DRIVING HORSE BEYOND PLACE FOR WHICH HE WAS HIRED IS SUBSTANTIAL CONVERSION and direct injury to owner's right of property, and not in substance a mere breach of the hirer's contract. *Woodman v. Hubbard*, 310.
2. BAILOR MAY HAVE ACTION FOR CONVERSION OR INJURY OF PROPERTY BAILED, though the contract of bailment was void, being made on Sunday; for in such an action he claims as general owner, and not under the contract. *Id.*
3. OWNER PLACING HIS PROPERTY IN HANDS OF ANOTHER to be used temporarily for an unlawful purpose does not forfeit his property in the thing thus delivered. *Id.*

See SALES, 2; *TROVER*, 2.

BANK BILLS.

See BANKS AND BANKING, 6, 7.

BANKRUPTCY AND INSOLVENCY.

INSOLVENCY WILL NOT AVAIL AS DEFENSE, nor bar a recovery of money promised in an action at law, when the consideration is an act to be performed subsequent to the insolvency. *Smith v. Busby*, 207.

See ADVERSE POSSESSION, 4; *INSURANCE—LIFE*, 1; *PARTNERSHIP*, 7, 8.

BANKS AND BANKING.

1. QUESTION WHETHER DEBTS OF BANK HAVE NOT BEEN PAID AND DISCHARGED is one which a jury could readily comprehend and satisfactorily decide, in an action brought by a trustee appointed on a judgment of forfeiture against a bank against a debtor of the bank. *Coulter v. Robertson*, 168.
2. ON JUDGMENT OF FORFEITURE AGAINST BANK, ALL ASSETS, consisting of credits or debts due to it, chattels, and real estate, become a trust fund for the sole purpose of paying the debts due by the bank at the time of its dissolution. *Id.*
3. POWERS OF TRUSTEE APPOINTED ON JUDGMENT OF DISSOLUTION AGAINST BANK under the act of the twentieth of July, 1843, are terminated when he has paid off and discharged the whole of the debts of the bank, and he can not sue for and recover the debts which were due to it, and which were still outstanding and unpaid. *Id.*
4. ABSENCE OF DEPOSIT IN BANK TO CREDIT OF DRAWER OF CHECK is sufficient notice to such bank not to pay the check. *Lancaster Bank v. Woodward*, 618.
5. PRACTICE OF PAYING OVERDRAFTS, even to persons in good standing with the bank, has no authority in sound usage or in law. *Id.*

6. **BURDEN OF PROOF IS NOT ON HOLDER OF BANK BILL STOLEN** before issuance, it seems, to show that he came by it fairly, in an action against the issuing bank; but it is otherwise as to a stolen note or bill of exchange. *Worcester County Bank v. Dorchester Bank*, 120.
7. **HOLDER OF BANK BILL STOLEN BEFORE ISSUANCE, RECEIVING IT BONA FIDE**, in the usual course of business, for value, may recover on it against the bank though he was guilty even of gross negligence in taking it, there being no evidence of fraud. *Id.*
- See CORPORATIONS**, 12; **NEGOTIABLE INSTRUMENTS**, 17; **TRUSTS AND TRUSTEES**, 7.

BARGAIN AND SALE.**See Deeds**, 2.**BILLS AND NOTES.****See NEGOTIABLE INSTRUMENTS.****BILLS OF EXCHANGE.****See BANKS AND BANKING**, 6; **NEGOTIABLE INSTRUMENTS**, 4, 5.**BILLS OF LADING.****See COMMON CARRIERS**, 3, 4, 7-9, 11.**BONA FIDE PURCHASERS.**

BONA FIDE PURCHASER FOR VALUE IS ENTITLED TO HAVE HIS TITLE PROTECTED by a court of equity, and will not be compelled to discover anything which will invalidate his title; but where he is charged with fraud, a court of equity will compel him to disclose the facts alleged as fraud. *Howell v. Ashmore*, 371.

See BANKS AND BANKING, 7; **EQUITY**, 2; **ESTOPPEL**, 6; **EXECUTIONS**, 9, 15; **PUBLIC LANDS**, 1; **RECEIVERS**, 1.

BONDS.

ON BREACH OF BOND GIVEN FOR PAYMENT OF MONEY, WITH DEFASANCE to be void upon the performance of a collateral undertaking, the whole penalty was forfeited and might be recovered in an action on the bond, at the common law; courts of chancery, however, restrain the collection of the penalty and compel the plaintiff to receive such damages as he had actually sustained. *Barnes v. Webster*, 232.

See ATTACHMENTS, 14-16; **EXECUTORS AND ADMINISTRATORS**, 11, 12, 16; **MORTGAGES**, 1; **NEGOTIABLE INSTRUMENTS**, 15; **OFFICES AND OFFICERS**, 2; **WITNESSES**, 2.

BOOK ENTRIES.**See EVIDENCE**, 9.**BOUNDARIES.**

DIRECT LINE IS IMPLIED WHEN POINT IS DESCRIBED AS BEING GIVEN DISTANCE from a certain other point, unless there is something to rebut the implication; and it is not rebutted by the fact that both the points are on the banks of a river. *Slade v. Etheridge*, 557.

BURDEN OF PROOF.

See BANKS AND BANKING, 6; COMMON CARRIERS, 11; RAILROADS, 3; TRUSTS AND TRUSTEES, 1.

BURGLARY.

See CRIMINAL LAW, 1, 2.

BY-BIDDING.

See AUCTIONS.

CARRIERS.

See COMMON CARRIERS.

CASE.

See CO-TEENANCY, 2; EXECUTIONS, 12.

CATTLE.

See CONTRIBUTION, 2; RAILROADS, 5, 8.

CATTLE DAMAGE FEASANT.

See CONTRIBUTION, 2.

CAVEAT EMPTOR.

See PROBATE COURTS, 4.

CERTIFICATES.

See ACKNOWLEDGMENTS.

CHARTERS.

See INSURANCE—FIRE, 1.

CHECKS.

See BANKS AND BANKING, 4, 5; NEGOTIABLE INSTRUMENTS, 11-12, 17.

CHOSES IN ACTION.

See DEEDS, 13.

CIRCUIT COURT.

See TRUSTS AND TRUSTEES, 7.

CODICILS.

See WILLS, 10.

COLLISIONS.

See RAILROADS, 4.

COLOR OF TITLE.
See CRIMINAL LAW, 4.

COMMON CARRIERS.

1. PARTIES MAY BIND THEMSELVES TO LIABILITIES OF COMMON CARRIERS upon one occasion only, and it is no defense to say that they have never done so before. *Chouteaux v. Leech*, 602.
2. COMMON CARRIERS ARE NOT RESPONSIBLE FOR REMOTE AND EXTRAORDINARY CONSEQUENCES of their negligence, but for those that are ordinary and proximate. *Morrison v. Davis*, 695.
3. EXCEPTION AS TO INEVITABLE ACCIDENTS IS IMPLIED BY LAW IN COMMON CARRIER'S FAVOR, when not expressed in the bill of lading, or other such contract; but this exemption will not be implied where the circumstances show that it should not be. *Id.*
4. PAROL EVIDENCE IS ADMISSIBLE TO REPEL IMPLICATION IN COMMON CARRIER'S FAVOR AGAINST INEVITABLE ACCIDENTS, and to show that he has agreed to insure the safe delivery of the goods, where he has simply undertaken by the bill of lading to deliver them. *Id.*
5. OWNER OF GOODS NEED NOT PROVE COMMON CARRIER'S ADVERTISEMENTS OR BUSINESS TERMS CAME TO HIS KNOWLEDGE before delivering his goods to the carrier for transportation: it is proper to presume that customers have been induced by the advertisements, or that they have been repeated to them, where favorable terms of business are advertised as a means of gaining customers. *Id.*
6. CONSIGNEE OF GOODS IS NOT BOUND TO MAKE TENDER TO CARRIER, who, having no legal claim on them for anything besides the freight, refuses to deliver them unless a further sum is first paid, where the consignee is ready to pay the freight. And, in an action of trover for the goods, the carrier's refusal to deliver them is evidence of a conversion. *Adams v. Clark*, 41.
7. MISTAKE IN BILL OF LADING, by erasing or neglecting to erase a word, can be proved like any other fact, by circumstantial as well as positive evidence. *Chouteaux v. Leech*, 602.
8. A FORM OF BILL OF LADING PRINTED TO BE USED AT PITTSBURGH, should have the word "Pittsburgh" erased and the word "Cincinnati" interlined in order to be used at the latter place. That such change had been made in the dating of the bill is a circumstance tending to show an intention to change it all through, and is sufficient to go to the jury. *Id.*
9. COMMON CARRIERS SHOULD BE HELD TO STRICT ACCOUNTABILITY, and slight evidence should be sufficient to set aside any special provision in a bill of lading, intended to relieve them from their ordinary legal responsibility. *Id.*
10. FURS WHICH BECOME WET WHILE IN CUSTODY OF COMMON CARRIER should be opened by him and dried, as it is his duty to lessen if not altogether prevent the effect of an accident. *Id.*
11. BURDEN IS ON CARRIER TO SHOW INJURY AROSE FROM STRESS OF WEATHER in an action against him for injury to goods where the bill of lading excepts "dangers of the sea." *Cameron v. Rich*, 747.
12. OWNER OF GOODS SHIPPED BY CARRIER CAN NOT ACCEPT PART AND ABANDON RESIDUE, on account of a loss by leakage, and recover of the carrier the value of the goods abandoned; as where molasses is shipped and some of the casks lose by leakage, and the owner accepts the residue and refuses to receive the leaking casks. *Shaw v. South Carolina R. R. Co.*, 763.

13. MEASURE OF DAMAGES FOR LOSS OF GOODS BY COMMON CARRIER is the price at the place of delivery. *Id.*

See EVIDENCE, 7, 8; RAILROADS.

COMMONS.

- 1. PARTITION DEED CREATES RIGHT OF COMMON APPURTENANT FOR SEA-WEED, GRAVEL, AND STONE** upon one part of the divided tract in favor of the other, so far as the owner of the share to which it is appurtenant may think proper or profitable for use on such part where by the deed there is granted to the owner of such part, his heirs and assigns, "free liberty of carrying away" gravel, sea-weed, and stones on the beach belonging to the other part, "and also liberty to tip the sea-weed on the bank" on such other part. *Hall v. Lawrence*, 715.
- 2. CONVEYANCE OF LAND WITH "APPURTENANCES" PASSES RIGHT OF COMMON** appurtenant thereto. *Id.*
- 3. RIGHT OF COMMON IS EXTINGUISHED BY CONVEYANCE OF PART** of the dominant estate, if such right is indivisible; otherwise if apportionable. *Id.*
- 4. COMMON IS APPOINTIONABLE WHENEVER IT IS ADMEASURABLE.** *Id.*
- 5. COMMON APPURTENANT FOR SEA-WEED, GRAVEL, ETC., IS APPOINTIONABLE,** belonging equally to every acre of the dominant estate. *Id.*
- 6. PROPORTIONATE PART OF COMMON FOR SEA-WEED, ETC., PASSES BY CONVEY-** ANCE OF PART of the dominant estate with "appurtenances," unless the effect would be to surcharge the servient estate, in which event the whole right of common is extinguished. *Id.*
- 7. CONVEYANCE OF PART OF DOMINANT ESTATE TO OWNER OF SERVIENT ES-** TATE EXTINGUISHES COMMON appurtenant for taking sea-weed, gravel, etc., as respects the part so conveyed, but leaves it intact as to the residue. *Id.*
- 8. COMMON APPURTENANT FOR SEA-WEED, GRAVEL, ETC., IS NOT SEVERABLE** FROM LAND to which it is appurtenant, and a reservation of such right of common to the grantor in a conveyance of part of the dominant estate is void. *Id.*

See EASEMENTS, 2.

COMPLAINT.

See PLEADING AND PRACTICE, 3.

COMPROMISE.

DEFENDANT COMPROMISING SUIT BY EXECUTING NEW NOTE for a sum less than the amount sued for is bound by his act; and when sued on the note so given, is estopped from using a defense which should have been used in the suit brought upon which the compromise was founded. *Draper v. Owsley*, 218.

CONDITIONS.

See DEEDS, 6-8; INFANCY, 1, 2, 6, 7; INSURANCE—FIRE, 2; LANDLORD AND TENANT, 9, 10; MARRIED WOMEN, 7; MORTGAGES, 2, 3; NOTICE.

See CONDITIONS OF CONTRACTS, 4.
See CONTRACTS, 4.

CONFESSTION OF JUDGMENT.

See ATTACHMENTS, 1, 2; PARTNERSHIP, 6.

CONFIRMATION.

See EXECUTORS AND ADMINISTRATORS, 15-17, 20; INFANCY; PROBATE COURTS, 5.

CONFLICT OF LAWS.

See WILLS, 7, 13.

CONSIDERATION.

See ASSIGNMENT OF CONTRACTS, 6; BANKRUPTCY AND INSOLVENCY; COVENANTS, 5-10, DEEDS, 2; FRAUDULENT CONVEYANCES; GUARDIAN AND WARD, 3; INJUNCTIONS, 2; INSURANCE—LIFE, 2; NEGOTIABLE INSTRUMENTS, 3, 13, 15; RECEIVERS, 1; RELEASES; VENDOR AND VENDEE, 2.

CONSIGNOR AND CONSIGNEE.

See COMMON CARRIERS, 6; FACTORS.

CONSTITUTIONAL LAW.

*STATE LAWS ARE NOT BINDING UPON OFFICERS OF FEDERAL GOVERNMENT, and a sale made by a United States marshal will be deemed valid until set aside by the federal court. *Kennedy v. Shepley*, 219.**See FUGITIVES FROM JUSTICE.*

CONSTRUCTION.

See CONTRACTS, 2; CORPORATIONS, 2, 6, 11; DOWER, 1, 2; EXECUTORS AND ADMINISTRATORS, 6; LANDLORD AND TENANT, 2, 3; STATUTES; TRUSTS AND TRUSTEES, 5; WILLS, 7, 8, 14, 15.

CONTRACTS.

1. **CONTRACT CAN NOT BE PROVED BY DECLARATIONS** of the parties thereto where those declarations stand opposed to each other. *Routin v. Simpson*, 668.
2. **IN CONSTRUING CONTRACT, INTERPRETATION MUST BE UPON ENTIRE INSTRUMENT**, and not merely on disjointed or particular parts of it. *Foster v. Pettibone*, 530.
3. **QUANTUM MERUIT UNDER SPECIAL CONTRACT.**—Where a party to a contract for building a dam, acting in good faith and intending to fulfill his contract, unintentionally fails in some particulars to perform it, he may recover from the other party to the contract so much as the labor and materials are worth to the latter, deducting from the contract price so much as the dam built by him is worth less than the dam contracted for. *Gleason v. Smith*, 62.
4. **CONTRACT BEING ENTIRE, PERFORMANCE BY PLAINTIFF IS CONDITION PRECEDENT** to his recovery; and it must be averred in his declaration and proved, unless the opposite party has discharged him from executing it, either by refusing to let him go on with it, or by disabling himself from performing his part; and if the plaintiff fails to aver performance, or a readiness to do so, he can recover neither on the special contract nor on a *quantum meruit*. *Winstead v. Reid*, 571.

5. PLAINTIFF CAN NOT RECOVER ON QUANTUM MERUIT WHERE CONTRACT WAS ENTIRE and executory, and after performing a part he willfully, and without just excuse, and against the will of the defendant, refused to go on with it. *Id.*

See AGENCY; ASSIGNMENT OF CONTRACTS; ASSUMPTION; AUCTIONS; BAILEMENTS; COMMON CARRIERS; CORPORATIONS, 13, 14; CO-TENANCY, 6; FRAUD, 3; INFANCY; INSURANCE—FIRE; INSURANCE—LIFE; LANDLORD AND TENANT, 2; NEGOTIABLE INSTRUMENTS; SALES; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; SUNDAYS; TROVER, 2, 3; VENDOR AND VENDER.

CONTRIBUTION.

1. WRONGDOERS CAN NOT HAVE REDRESS OR CONTRIBUTION AGAINST EACH OTHER, upon being held liable for the unlawful act, but this rule is confined to cases where the person claiming redress knew, or must be presumed to have known, that the act was unlawful. *Jacobs v. Pollard*, 105.
2. PERSON UNLAWFULLY SEIZING CATTLE DAMAGE-PEASANT MAY RECOVER PROCEEDS from the officer selling them at his instance in an action for money had and received, where he has been compelled to pay a judgment in trespass, recovered against himself and the officer jointly for such seizure, by the true owner, if the parties acted in good faith in making the seizure. *Id.*

CONTROLLERS.

See CORPORATIONS, 15.

CONVERSION.

See BAILEMENTS, 1, 2; COMMON CARRIERS; CO-TENANCY, 1; TROVER.

COPARTNERSHIP.

See PARTNERSHIP.

CORPORATIONS.

1. GENERAL POWER GIVEN CORPORATION TO ACQUIRE, HOLD, AND CONVEY PROPERTY IS LIMITED TO, and can only be exercised to effect, the purposes for which it was conferred by the government. *State v. Commissioners*, 409.
2. CORPORATE POWERS STRICTLY INCIDENTAL AND NECESSARY TO OBJECT OF GRANT ARE IMPLIED, in addition to those expressly granted; for although corporate powers are to be strictly construed, yet they are not to be so construed as to defeat the object of the grant. *Id.*
3. WHERE AGENT OF CORPORATION IS CALLED AS WITNESS TO PROVE that he had paid numerous drafts on the company not previously accepted by it, if the drafts so paid may be presumed to be still in existence, they must be presumed to be in the company's possession, and notice to produce them must be given to it, before the testimony of the agent can be received. *Gould v. Norfolk Lead Co.*, 50.
4. PAYMENT OF UNACCEPTED DRAFTS ON CORPORATION, BY ITS AGENT, is not evidence of his authority to accept drafts upon it. The authority to pay drafts applies only to that specific class of transactions, and there can not be implied from it an authority to agree to pay at a future day. *Id.*

5. EVIDENCE THAT PERSON IS GENERAL AGENT OF CORPORATION has but little tendency to show that he has authority to accept drafts for it. *Id.*
 6. VOTE OF DIRECTORS OF CORPORATION IS WRITTEN INSTRUMENT, and must be construed by its terms alone, with reference to the subject-matter to which it applies; and parol testimony is not admissible for the purpose of showing the sense in which a director understood it. *Id.*
 7. CORPORATION WHOSE OFFICERS, ALTHOUGH INNOCENTLY DECEIVED BY FORGED POWER OF ATTORNEY, permit shares of stock to be transferred on the books without authority from the shareholder may be compelled to replace them or pay him the value of them. *Pollot v. Nat. Bank*, 520.
 8. UPON DEATH OF CORPORATION, all its real estate reverts by the common law to the original grantor or his heirs; the debts due to and from the corporation are all extinguished, and all the personal estate of the corporation vests in the crown, and with us, in the people. *Coulter v. Robertson*, 168.
 9. ACT OF LEGISLATURE PASSED SUBSEQUENT TO JUDGMENT OF FORFEITURE OF CORPORATION can not divest the powers of a trustee appointed by the court, nor the rights of creditors. *Id.*
 10. STOCKHOLDER IS NOT CREDITOR OF CORPORATION. *Id.*
 11. DEBTS DUE CORPORATION ARE NOT KEPT ALIVE FOR BENEFIT OF STOCKHOLDERS, under the statute passed the twentieth of July, 1843, and they have no right to the surplus; their rights are left as they were at the common law; this act was for the benefit of the creditors of the corporation merely. *Id.*
 12. RESULTING TRUST IS NOT CREATED IN FAVOR OF STOCKHOLDERS of bank on a judgment of forfeiture against it, in the surplus of the funds after the payment of the debts, as the rights of the stockholders do not survive the forfeiture. *Id.*
 13. CONTRACT WITH MUNICIPAL CORPORATION FOR EXCAVATING STREET does not imply an obligation to maintain guards and lights around it while the work is proceeding. *City of Buffalo v. Holloway*, 550.
 14. MUNICIPAL CORPORATION IS PRIMARILY BOUND TO KEEP EXCAVATION which it permits to be made in a street properly guarded; and can not cast this obligation on the contractor for the work, unless he has expressly assumed it. *Id.*
 15. NOTICE TO COMPTROLLER OF CITY OF NEW YORK, of a demand against the city, is notice to the corporation. *Field v. Mayor*, 435.
- See EQUITY, 6; INSURANCE—FIRE, 1; LIBEL, 1; NEGOTIABLE INSTRUMENTS, 18; RAILROADS; TAXATION.

COSTS.

See COVENANTS, 5.

CO-TENANCY.

1. TO MAINTAIN TROVER BETWEEN CO-TENANTS, it is necessary to show a destruction of the property, or some act tantamount to a destruction, and the action will not lie by one co-tenant for a mere conversion by a defendant claiming under the other co-tenant. *Rooks v. Moore*, 569.
2. TENANT IN COMMON CAN MAINTAIN ACTION ON CASE AGAINST CO-TENANT whenever a permanent injury is done to the freehold by his co-

tenant, in which his damages shall be measured by the injuries actually sustained. *Smith v. Sharpe*, 574.

2. ONE TENANT IN COMMON CAN NOT MAINTAIN ACTION OF WASTE against the other, where the act complained of instead of injuring the common estate has improved it. *Id.*
4. TENANT IN COMMON CAN NOT BE MADE TO ACCOUNT for the value of marsh dug and carried away by him, in an action of waste by his co-tenant for digging and carrying it away. *Id.*
5. DOCTRINE THAT OUTSTANDING TITLE BOUGHT IN BY ONE TENANT IN COMMON INURES TO BENEFIT of his co-tenants is one of equitable cognizance, and courts of equity apply it so as to do justice among the tenants. *Rector v. Waugh*, 251.
6. RIGHT IN GROSS AND NOT RIGHT APPURTEnant IS CREATED by an agreement on the part of one tenant in common of a tract of land who is also several owner of an adjoining tract that he will give his co-tenant the privilege of purchasing his undivided moiety of the common land within a certain time at a certain price, and that if such purchase is made, he, his heirs and assigns, shall have an equal privilege with the co-tenant of taking sea-weed on said tract, and this right does not inure to the benefit of one who, after the agreement, but before any purchase of such undivided moiety by the co-tenant, purchases the adjoining tract from the other tenant in common. *Hall v. Lawrence*, 711.

See COMMONS; PARTITION; WATERCOURSES, 6.

COURTS.

See PROBATE COURTS; TRUSTS AND TRUSTEES, 7.

COVENANT.

See COVENANTS, 11.

COVENANTS.

1. COVENANT TO CONVEY BY DEED, with general warranty, is not satisfied by the mere execution of a formal instrument with covenants of title, as it implies that the covenantor will convey an indefeasible estate, and that his deed shall be operative for that purpose. *Smith v. Busby*, 207.
2. DURATION OF WARRANTY IS Co-EXTENSIVE ONLY WITH ESTATE to which it is annexed; and on a conveyance of an estate for life with warranty, the warranty becomes extinct on the death of the grantee. *Rector v. Waugh*, 251.
3. REMEDY BY ANCIENT WARRANTY never had any practical existence in the United States. *Id.*
4. TENANT IN WRIT OF ENTRY IS NOT ESTOPPED BY HIS COVENANT OF WARRANTY in a deed to his grantee, to whom he conveyed a good title, from setting up a subsequent title acquired by disseisin. *Stearns v. Hendersass*, 65.
5. DAMAGES FOR BREACH OF COVENANTS OF SEISIN, for quiet enjoyment, of good right to convey, and of warranty can not exceed the amount of the consideration of the conveyance, with interest thereon and the costs of the suit attending the eviction; and where the grantee's loss has been actually less, he is limited to the amount of injury sustained. *Wilcox v. Wilcox*, 320.

6. INCREASED VALUE OF LAND FROM RISE IN VALUE OR IMPROVEMENTS can not be recovered as damages in an action for the breach of covenants of seisin, for quiet enjoyment, of good right to convey, and of warranty. *Id.*
7. DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES CAN NOT EXCEED the amount paid by the grantee to extinguish the incumbrance, with compensation for his trouble and expenses. *Id.*
8. ONLY NOMINAL DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES can be recovered if the incumbrance is still contingent and no injury has been sustained by the plaintiff. *Id.*
9. WHERE INCUMBRANCE IS CHANGED INTO TITLE ADVERSE AND INDEFEASIBLE, grantee in action for breach of covenant against incumbrances may recover as damages the amount paid for the land, with interest. *Id.*
10. GRANTEE IN ACTION FOR BREACH OF COVENANT AGAINST INCUMBRANCES, who, though out of possession, can obtain the land by payment of a certain sum, can recover that sum only, as otherwise he might recover the consideration money, and then obtain the estate by the payment of a smaller sum. *Id.*
11. AFTER DEFAULT IN ACTION OF COVENANT DEFENDANT MAY INTRODUCE EVIDENCE tending to prove an adjustment or payment of the damages. *Id.*
See DEEDS, 2; EXECUTORS AND ADMINISTRATORS, 12; LANDLORD AND TENANT, 4-6; PARTITION, 4-6; WITNESSES, 2.

COVENANT TO STAND SEISED.

See DEEDS, 2.

CREDITORS' BILLS.

See EQUITY, 11; FRAUDULENT CONVEYANCES, 7; JUDGMENTS, 2; RECEIVERS, 2.

CRIMINAL LAW.

1. IN BURGLARY THERE MUST BE BREAKING, REMOVING, OR PUTTING ASIDE of something material which constitutes a part of the dwelling-house and is relied on as a security against intrusion. *State v. Boon*, 555.
2. IT IS BURGLARY TO ENTER HOUSE BY MEANS OF RAISING WINDOW, though it was not then fastened. *Id.*
3. EVIDENCE OF INTENT TO COMMIT RAPE IS SUFFICIENT TO BE SUBMITTED TO JURY when it shows that the prisoner entered a room where a young lady was sleeping by means of raising a window, went to the bed, grasped her ankle, and hastily retreated, without any attempt at explanation when she screamed. *Id.*
4. DEFENDANT IS NOT GUILTY OF LARCENY IN TAKING PROPERTY UNDER FAIR COLOR OF CLAIM OR TITLE, although he may be mistaken. *State v. Homes*, 269.
5. LARCENY IS COMMITTED BY ONE OBTAINING POSSESSION OF GOODS WITH OWNER'S CONSENT, under pretense of taking them to another to examine with a view to purchasing, but with a real intent to steal them, and afterwards converting them to his own use by pawning or otherwise. *State v. Lindenhal*, 743.

See FUGITIVES FROM JUSTICE; PROCESS, 1, 2.

CROPPERS.

See LANDLORD AND TENANT, 2.

CROSS-BILLS.

See EQUITY, 12.

CROSS-EXAMINATION.

See WITNESSES, 5.

DAMAGES.

See BONDS; COMMON CARRIERS, 13; CO-TENANCY, 2; COVENANTS, 5-11; DECEIT; DRUGGISTS; EXECUTORS AND ADMINISTRATORS, 22; INSURANCE—FIRE, 6-9; JUDGMENTS, 1, 4; LIBEL; NUISANCES; OFFICES AND OFFICERS, 2, 4; PLEADING AND PRACTICE, 8; RAILROADS, 5; TROVER, 3; WATER-COURSES, 9, 12.

DAMS.

See CONTRACTS, 3; EASEMENTS, 8; LICENSES, 2; WATERCOURSES, 1, 4, 6, 12-14.

DANGERS OF THE SEA.

See COMMON CARRIERS, 11.

DEATH.

See AGENCY, 1; ATTACHMENTS, 11; CORPORATIONS, 8, 9, 11; EXECUTIONS, 12; EXECUTORS AND ADMINISTRATORS, 7; INSURANCE—FIRE, 2; MARRIED WOMEN, 18; WILLS, 6, 7.

DEBTOR AND CREDITOR.

GENERAL CREDITOR HAVING NO SPECIFIC LIEN on the debtor's property has no right to interfere with any disposition his debtor may see fit to make of it. *Hunt v. Field*, 365.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; ATTACHMENTS.

DECEIT.

DECEIT PRACTICED BY DEFENDANT, CAUSING DAMAGE TO PLAINTIFF, may sustain an action without proof of benefit to the defendant. *White v. Merritt*, 527.

See AGENCY, 5; JUDGMENTS, 4.

DECLARATIONS.

See ADVERSE POSSESSION, 4; ASSIGNMENT OF CONTRACTS, 5, 6; CONTRACTS, 1, 4; EQUITY, 4; EVIDENCE, 9, 10, 12; EXECUTORS AND ADMINISTRATORS, 7; FRAUDULENT CONVEYANCES, 3; INFANCY, 7; NEGOTIABLE INSTRUMENTS, 14; PLEADING AND PRACTICE, 1, 3, 5.

DECREES.

See JUDGMENTS.

DEEDS.

1. WORD "HEIRS" IN DEED IS NECESSARY TO CREATE ESTATE IN FEE SIMPLE. *Rector v. Waugh*, 251.
2. CONVEYANCE TO SON-IN-LAW "IN CONSIDERATION OF NATURAL LOVE AND AFFECTION," etc., is not good as a deed of bargain and sale, because it shows no pecuniary consideration; nor as a covenant to stand seized, be-

- cause affinity by marriage is not a sufficient consideration for such a covenant. *Corraine v. Corwin*, 453.
3. UNRECORDED DEED PREVAILS IN LAW OVER TITLE OF SUBSEQUENT PURCHASER with notice of the deed. *Draper v. Bryson*, 257.
 4. STATUTE FIXES DATE OF DEED, and not the date of its acknowledgment, as the commencement of the three months within which it is to be recorded. *Id.*
 5. SUBSEQUENT GRANTEE CAN NOT DISPUTE PRIOR GRANTEE'S DEED FOR HIS FAILURE TO RECORD it within the time prescribed by statute, where his own deed has not been recorded within the statutory time; and the prior purchaser takes the better title if his deed is first recorded. *Id.*
 6. CONDITION IN GRANT IN FEE THAT GRANTEE SHALL NOT ALIEN is void, because it is repugnant to the estate. *De Peyster v. Michael*, 470.
 7. CONDITIONS IN PARTIAL RESTRAINT OF ALIENATION, as that the grantee shall not alien or assign to a particular person or for a particular time, have been held good, but some of the cases so holding are of doubtful authority. *Id.*
 8. CONDITION IN DEED THAT GRANTEE ALIENATING SHALL PAY PART OF PRICE received to the grantor is void, because it is a restraint on alienation. *Id.*
 9. RESTRAINTS ON ALIENATION OF LAND HELD IN FEE WERE FEUDAL in their origin and depended on the right of escheat, possibility of reversion existing in the grantor in fee. *Id.*
 10. STATUTE QUILA EMPTORES ABOLISHED RESTRAINTS ON ALIENATION of fee simple estates in England, because it took away the possibility of reversion from the grantor. *Id.*
 11. STATUTE QUILA EMPTORES WAS NEVER IN FORCE IN NEW YORK, it seems, and restraints on alienation in grants in fee were therefore valid, until abolished by state statutes. *Id.*
 12. NEW YORK STATUTES OF 1779 AND 1787 ABOLISHED RESTRAINTS ON ALIENATION in grants or leases in fee whether such leases or grants were executed before or after the statutes were passed, by taking away the grantors' or lessors' possibility of reversion. *Id.*
 13. RENT RESERVED WITH RIGHT OF ENTRY FOR NON-PAYMENT IS NOT REVERSION or possibility of reversion so as to validate a restraint on alienation, the right of entry being a mere chose in action, and no estate in the land. *Id.*

See ACKNOWLEDGMENTS; BOUNDARIES; COMMONS; COVENANTS; EQUITY, 10; EXECUTORS AND ADMINISTRATORS, 5, 16; FRAUDULENT CONVEYANCES, 2; HUSBAND AND WIFE, 2; MORTGAGES, 2; NOTICE; PLEADING AND PRACTICE, 5; VENDOR AND VENDEE, 4.

DEFAULT.

See COVENANTS, 11; JUDGMENTS, 1; PLEADING AND PRACTICE, 8.

DEFEASANCES.

See BONDS.

DEFINITIONS.

See POSSESSION; WASTE.

DELIVERY.

See Assignment of Contracts, 4; Common Carriage, 4-5, 12.

DEMAND.

See Corporations, 15; Negotiable Instruments, 5, 8, 9.

DEMURRER.

See Pleading and Practice, 5.

DEPOSITIONS.

See Witnesses, 3, 4.

DEPOSITS.

See Banks and Banking, 4; Negotiable Instruments, 17.

DEPUTIES.

See Pleading and Practice, 2.

DESCRIPTION.

See Boundaries; Executions, 1-5; Receivers, 2; Wills, 9, 10.

DEVISE.

See Dower, 4; Married Women; Wills.

DIRECTORS.

See Corporations, 6.

DISCOVERY.

See Bona Fide Purchasers; Equity.

DISSEISIN.

See Covenants, 4.

DISSOLUTION.

See Banks and Banking, 1-3; Corporations, 8, 9, 11; Partnership, 6-8, 10.

DISTRIBUTION.

See Partnership, 8.

DOWER.

1. If wife commit adultery after leaving her husband, it is a tarrying so as to bar her of her right of dower under revised statutes, c. 121, sec. 11, barring a claim of the wife for dower if she willingly leave her husband and go away and continue with her adulterer, although she does not continually remain in adultery with him. *Walters v. Jordan*, 558.
2. Wife driven or ordered away by husband on account of his adultery is not barred of her dower under revised statutes, c. 121, sec. 11, although she afterwards commit adultery with a new or former adulterer. *Id.*
3. Wife was entitled to dower though she was adulterous at common law. *Id.*

4. WIFE'S DOWER IN LANDS ALIENED BY HUSBAND IS NOT BARRED BY DEVISE to her of all her husband's property during her life or widowhood, though the devise is accepted. *Braxton v. Freeman*, 773.
5. INTENT THAT WIFE'S DOWER SHALL BE BARRED BY ACCEPTANCE OF PROVISION under the husband's will must appear in the will by express words or necessary implication. *Id.*

DRAINAGE.

See EASEMENTS, 7-9, 15.

DRAFTS.

See CORPORATIONS, 3-5; NEGOTIABLE INSTRUMENTS, 17, 18.

DRUGGISTS.

MANUFACTURING DRUGGIST SELLING POISONOUS DRUG LABELED AS HARMLESS, by himself or his agent, is liable in damages to a person who, without carelessness on his part, and relying on the erroneous label, takes such drug as a medicine, on the ground of breach of public duty, and whether the injured person is an immediate customer of the defendant or not. *Thomas v. Winchester*, 455.

DURESS.

See WILLS, 4.

EASEMENTS.

1. GRANTEE OF RIGHT OF WAY TAKES IT SUBJECT TO ALL RESTRICTIONS which the grantor has imposed, and can use it for no other purpose than that provided in the grant. *French v. Martin*, 294.
2. RIGHT OF WAY INCIDENT TO RIGHT OF COMMON FOR TAKING SEA-WEED, etc., passes by implication, by a grant of such right of common, upon one tract of land in favor of another. *Hall v. Lawrence*, 715.
3. RIGHT OF WAY IS RESERVED BY IMPLICATION TO WRECK COMMISSIONER ON GRANT OF LAND on "the banks," where there is no other way of getting to the shore. *Hefield v. Baum*, 563.
4. PRIVATE RIGHT OF WAY MAY EXIST BY NECESSITY. *Id.*
5. TWENTY YEARS' UNINTERRUPTED USER OF EASEMENT is *prima facie* evidence of right to use such easement. *French v. Martin*, 294.
6. GRANT OF CONTINUOUS AND APPARENT EASEMENTS IS IMPLIED ON SEVERANCE OF HERITAGE where, though having no legal existence as easements, they have in fact been used by the owner during the unity of the heritage, or where they are necessary to the full enjoyment of the several portions of the heritage. *Elliott v. Rhett*, 750.
7. GRANT OF RIGHT OF DRAINAGE IS IMPLIED ON SEVERANCE OF HERITAGE by a conveyance of part, in favor of the part conveyed, as against the residue, where such right has been continuously exercised by the owner of the entire tract, and there is no natural drainage. *Id.*
8. ABANDONMENT OF SCHEME OF CULTIVATION WHICH WILL DESTROY EASEMENT or right of drainage in favor of one part of an entire tract owned by a common owner, as against the residue, where the former part is conveyed to another person, must be permanent; an accidental and tem-

porary breaking of a dam constituting part of a system of drainage is not sufficient. *Id.*

9. ARTIFICIAL EASEMENT OF DRAINAGE CREATED BY OWNER OF ENTIRE TRACT in favor of one part against another is entitled to the same consideration as if it existed by nature. *Id.*
10. ARTIFICIAL EASEMENT SUBSTITUTED FOR NATURAL RIGHT of property is entitled to more favorable regard than one which is a restriction upon a natural right. *Id.*
11. REQUEST TO REMOVE DISTURBANCE OF EASEMENT IS ESSENTIAL before bringing an action against one who was not the creator of the disturbance. *Id.*
12. PLAINTIFF MUST REMOVE OBSTRUCTIONS TO ENJOYMENT OF EASEMENT existing on his own land, or show his readiness to do so, before he can maintain an action against another for disturbing such easement. *Id.*
13. RIGHT TO EASEMENT MAY BE LOST BY ENCROACHMENT, in many cases. *Id.*
14. WHERE USURPED AND RIGHTFUL EASEMENT ARE BLENDED by the person entitled to the rightful easement, he can not complain of an obstruction of both unless he can show that the usurped easement might have been obstructed without disturbance of the rightful one. *Id.*
15. EASEMENT APPURTENANT IS GENERALLY EXTINGUISHED BY UNITY OF TITLE in the dominant and servient estates in the same person; not so where it is essential to the enjoyment of the estate, as in case of an easement of drainage, unless, while the estates are united, the easement is actually severed. *Ferguson v. Witsell*, 744.
16. ACTUAL POSSESSION OF LAND IS SUFFICIENT TO MAINTAIN ACTION FOR DISTURBING EASEMENT appurtenant thereto, and if seisin and possession are alleged, but possession only is proved, it is enough. *Id.*

See COMMONS; LICENSES, 1; PLEADING AND PRACTICE, 5.

EJECTMENT.

1. LESSON OF PLAINTIFF, IN ACTION OF EJECTMENT, MUST HAVE LEGAL TITLE at the time of the demise laid, and at the time of the action brought. *Lauricci v. Corquette*, 200.

2. LEGAL TITLE EXISTS ONLY FROM DATE OF ITS ACQUISITION, and can not be given in evidence to sustain an action of ejectment brought before it was acquired. *Id.*

See JUDGMENTS, 5; STATUTE OF LIMITATIONS, 3; TRUSTS AND TRUSTEES, 8; WILLS, 4, 5.

ELECTION.

See INSURANCE—FIRE, 3.

EMINENT DOMAIN.

See TRESPASS, 6.

ENTIRE.

See CONTRACTS.

CONTRACTS.

See ENTIRE, 4, 5.

COPIES.

See CONTRACTS, 9.

DEPONENTS.

See CONTRACTS, 9.

ENTRY.

See ADVERSE POSSESSION, 3; COVENANTS, 4; DEEDS, 12; EXECUTIONS, 6.

EQUITY.

1. COURT OF EQUITY IN ADMINISTERING JUSTICE adapts itself to the peculiar circumstances of each case brought before it. *Higginbottom v. Short*, 198.
2. IT IS PROPER OBJECT FOR BILL OF DISCOVERY to ascertain, in a case where the defendant's title can only prevail upon the ground of his being a bona fide purchaser without notice of the plaintiff's title, whether he had such notice, and to call upon him to disclose all the circumstances which may go to probe his conscience upon that point. *Hosell v. Ashmore*, 371.
3. IN COURT IN WHICH ACTION IS BROUGHT CAN COMPEL DISCOVERY, a court of equity will not interfere. *Id.*
4. THE RIGHT TO CALL DEFENDANT AS WITNESS AT TRIAL does not prevent the plaintiff from maintaining a bill of discovery against him before the trial. He may need the facts discovered at the trial, or he may bring the bill before the suit has been commenced, to enable him to frame his declaration. *Id.*
5. THAT BILL OF DISCOVERY SEEKS DISCOVERY FROM DEFENDANT who is a mere witness, and has no interest in the suit, is, as a general rule, a good objection to it. *Id.*
6. BILL FOR DISCOVERY MERELY MAY BE MAINTAINED against a corporation and its officers. *Id.*
7. BILLS FOR DISCOVERY ARE FAVORED IN EQUITY, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction. *Id.*
8. BILL FOR DISCOVERY WILL BE GRANTED MORE READILY, and with less nice application of technical rules, than a bill for an injunction to stay proceedings at law, or to interfere with such proceedings in any way. *Id.*
9. BILL FOR DISCOVERY NEED NOT STATE that the discovery is absolutely necessary; it is sufficient to state that it is material. *Id.*
10. AVERTMENT OF MATERIALITY AND NECESSITY OF DISCOVERY.—Bill for discovery which does not distinctly aver that the discovery is material and that the facts can not be otherwise proved, but which asks the defendant to discover whether he had knowledge of a prior unrecorded deed, and states that the party from whom the deed was procured lives out of the state, and that there were no witnesses thereto, and that the defendant has at all times refused to give any information in relation thereto, sufficiently shows the materiality of the testimony, and that it can not be procured from any other source. *Id.*
11. EXECUTION MUST BE RETURNED UNSATISFIED BEFORE CREDITOR'S BILL can be filed under 2 N. Y. R. S., secs. 38, 39, to compel a discovery of a judgment debtor's property, but those sections do not affect the common-law powers of a court of chancery as to fraudulent trusts and conveyances, and a judgment creditor may, independently of the statute, maintain a bill to set aside a fraudulent conveyance by his debtor, although he may also have a legal remedy by levy and sale. *Per Gardiner, J. Chautauque Co. Bank v. White*, 442.
12. BILL IN EQUITY WILL BE TREATED BY THE COURT AS ORIGINAL or as a cross-bill, according to its substance and the relief prayed; not accord

ing to the title which may have been given to it by the solicitor. *Pollock v. National Bank*, 520.

See **ASSIGNMENT OF CONTRACTS**, 1, 2, 10; **ATTACHMENTS**, 1; 2; **BONA FIDE PURCHASERS**; **BONDS**; **CO-TENANCY**, 5; **ESTOPPEL**, 4, 6; **EVIDENCE**, 1; **GUARDIAN AND WARD**, 3; **HUSBAND AND WIFE**, 1; **INJUNCTIONS**; **JUDGEMENTS**, 2; **MORTGAGES**; **MARRIED WOMEN**, 1, 2, 11; **PARTITION**, 2; **RECEIVERS**; **RELEASE**, 2; **SPECIFIC PERFORMANCE**; **STATUTE OF FRAUDS**, 3; **STATUTE OF LIMITATIONS**; **TRUSTS AND TRUSTEES**, 8.

ERROR.

See **EXECUTIONS**, 9, 10, 12; **JUDGEMENTS**, 7; **NEGLIGENCE**, 1; **PLEADING AND PRACTICE**, 13, 14, 16.

ESCHEAT.

See **DEEDS**, 9.

ESTATES FOR LIFE.

TENANT FOR LIFE OR PERSONALTY IS ENTITLED TO INCREMENT made during the course of the tenancy, as a compensation for the trouble and expense of taking care of the original stock. *Saunders v. Haughton*, 581.

See **COVENANTS**, 2; **EXECUTORS AND ADMINISTRATORS**, 2, 3; **HUSBAND AND WIFE**, 3; **PARTITION**, 3.

ESTATE IN FEE.

See **DEEDS**.

ESTATES OF DECEDENTS.

ALLOWANCE OF CLAIM AGAINST DECEDENT'S ESTATE OPERATES AS JUDGEMENT, but whether it will operate as a lien, *quare*. *Kennerly v. Shepley*, 219.

See **EXECUTORS AND ADMINISTRATORS**; **WILLS**.

ESTOPPEL.

1. **PARTY IS NOT ESTOPPED BY EXPRESSING HONEST BUT MISTAKEN OPINION** on a question of law; as that a certain judgment is a lien upon land claimed by him, especially where the statement was not made in the presence of the person claiming the estoppel. *Chautauque Co. Bank v. White*, 442.
2. **DEFENDANT IN TROVER IS NOT ESTOPPED** from showing that he was not in fact in the possession and control of the property at the time of the demand, although at that time he induced the plaintiff to believe the contrary. *Jackson v. Pixley*, 64.
3. **ADVERSE CLAIMANT'S PRESENCE AND SILENCE AT SHERIFF'S SALE DO NOT AMOUNT TO ESTOPPEL** from asserting his title to the land, if the purchaser knew of the claim. *Owen v. Myers*, 693.
4. **PURCHASER'S TITLE TO SLAVE**, PURCHASED DURING OWNER'S INFANCY from one having no title, can not be disputed, at law or in equity, by infant when he has reached his majority, if, having full knowledge of his rights, and possessing such discretion and intelligence as enable him to comprehend the import and effect of his conduct, he stood by and en-

couraged the sale, whereby the purchaser was induced to purchase, under the impression that the title was good. *Barham v. Turbeville*, 782.

5. PERSON MAY BE ESTOPPED BY MATTER IN PAIS as well as by record and by deed. *Id.*
6. INFANT IS ESTOPPED BY HIS ACTUAL AND POSITIVE FRAUD, at law as well as in equity, from attacking the title of an innocent purchaser. *Id.*
7. DEFENDANT IS NOT ESTOPPED TO SHOW BETTER TITLE THAN COMMON ORIGIN, from which both trace title, and under which the defendant obtained possession, in trespass to try title, but it is not sufficient merely to raise a doubt as to which is the paramount title. *Martin v. Ranlett*, 770.

See COMPROMISE; COVENANTS, 4; FRAUD, 3; INSURANCE—FIRE, 4; PUBLIC LANDS; WATERCOURSES, 6.

EVICTION.

See COVENANTS, 5.

EVIDENCE.

1. EVIDENCE OFFERED IN SUPPORT OF ALLEGATIONS IN BILL SHOULD BE RECEIVED, where it tends to prove the case made out in the bill, and the bill contains equity. *Groves' Heirs v. Fulsome*, 247.
2. ALL ADMISSIONS ARISING OR FAIRLY TO BE INFERRED FROM ACQUIESCEANCE of a party are competent evidence. Therefore, in a suit against A. and B. as copartners, under the firm name of A. & Co., on a note signed in the firm name, a letter written by the purchasing agent of the firm to B., informing him that A. had stated to the writer that a copartnership had been formed between A. and B., and that he wrote to ascertain whether B. was really responsible for goods bought for the firm's store, stating that the proceeding was rendered necessary from the fact that a credit was then needed to carry on the business successfully, and adding that he wrote the letter with the knowledge of A., is competent evidence to be submitted to the jury in connection with other evidence to prove the copartnership, although the letter was never answered by B., where after the letter was written the writer had a conversation with B. in reference to it, in which he again asked B. if he was a partner in the firm of A. & Co., and B. said he would neither admit nor deny it. But without this subsequent conversation the letter would not have been admissible. *Dutton v. Woodman*, 46.
3. TESTIMONY OF ONE PARTNER MAY BE CONTRADICTED BY WRITTEN AGREEMENT, by which such partner sold his interest in the partnership property to his copartner, where, in an action by the latter against a sheriff for selling the partnership property on an execution against the former alone, the former testified for the defendant that he owned the property at the time of the levy, and had never perfected the sale to his copartner. *Deal v. Bogue*, 702.
4. To ESTABLISH PECUNIARY CONDITION OF MAN AT CERTAIN DATE, evidence that his children forty years after were the owners of considerable property is too remote to be safe. *Strimpfle v. Roberts*, 606.
5. TITLE PAPERS NEED NOT BE INTRODUCED TO SHOW CIRCUMSTANCES OF PARTY.—General acts of ownership, such as a letter to his agent requesting him to pay taxes on certain property, are admissible. *Id.*

6. RECITALS IN PATENT ARE NOT EVIDENCE AGAINST ONE HOLDING BY SETTLEMENT, or other right prior to the date of the patent, although they are evidence against one who relies on possession alone, and shows no title, or who claims under improvements or other rights arising subsequently to the date of the patent. *Gingrich v. Foltz*, 631.
7. LOG-BOOK KEPT BY DECEASED MATE IS NOT COMPETENT EVIDENCE for the master of a vessel in an action against him for an injury to goods carried by him, to prove the occurrence of storms on the voyage. *Cameron v. Rich*, 747.
8. PROTEST BY MASTER AND CREW OF VESSEL IS INADMISSIBLE EVIDENCE in favor of the master in an action against him for an injury to goods carried by him. *Id.*
9. GENERAL RULE AS TO ADMISSIBILITY OF WRITTEN ENTRIES AND DECLARATIONS in evidence, stated *per O'Neill, J.* *Id.*
10. DECLARATION OF VENDOR OF PERSONAL PROPERTY MADE WHILE HOLDING IT is evidence against those claiming under him. *Satterwhite v. Hicks*, 577.
11. OPINIONS OF PERSONS THAT SLAVE SOLD AS SOUND WAS SUFFERING FROM SYPHILIS is not competent where such persons were not physicians. *Lush v. McDaniel*, 566.
12. DECLARATIONS OF SLAVE WOMAN AS TO HER SUFFERINGS and condition at any particular time are evidence of her state at the time she made them, in an action for a breach of warranty of soundness on her sale; but her declarations in reference to past periods are not admissible. *Id.*
13. IN ACTION FOR BREACH OF WARRANTY OF SOUNDNESS IN SALE OF SLAVE who died from syphilis some months after the plaintiff purchased her, evidence that the disease was not known to have existed in the part of the country where she was sold, and was known to exist in the place to which she was carried, is admissible as affording some aid to the jury in establishing the probable period when she became infected. *Id.*

See ADVERSE POSSESSION, 4; ASSIGNMENT OF CONTRACTS, 9; BANKS AND BANKING, 6; COMMON CARRIERS, 4-9, 11; CONTRACTS, 1; CORPORATIONS, 4-6; COVENANTS, 11; CRIMINAL LAW, 3; EASEMENTS, 5; EJECTMENT, 2; EXECUTIONS, 4, 17; EXECUTORS AND ADMINISTRATORS, 8, 10, 22; FRAUDULENT CONVEYANCES, 3, 4; FUGITIVES FROM JUSTICE, 6; INFANCY, 9; JUDGMENTS, 1, 3; MARRIED WOMEN, 17; NEGLIGENCE, 1; NEGOTIABLE INSTRUMENTS, 7, 8, 13-15, 18; PARTNERSHIP, 1, 2; PLEADING AND PRACTICE, 16; PUBLIC LANDS, 5; RAILROADS, 2; STATUTE OF FRAUDS, 3; TRESPASS, 3, 4; TRUSTS AND TRUSTEES, 1, 3; WILLS, 2, 3, 5, 6

EXAMINATION OF WITNESSES.

See WITNESSES, 5.

EXCEPTIONS.

See COMMON CARRIERS, 3.

EXECUTIONS.

1. ARREST OF DEFENDANT DESCRIBED IN AN EXECUTION does not render the arrest by the wrong officer liable in trespass, if the defendant was described by the name in the original writ and made no defense. *Trull v. Howland*, 82

2. **LEVY OF EXECUTION ON LAND MUST CONTAIN SUCH GENERAL DESCRIPTION** as will, by reasonable intendment, connect it with the sale and deed, so that purchasers may know the land to be sold, and form some estimate of its value, and that the sheriff or marshal making the sale, or his successor, looking to the levy, may know what land to convey, and not sell one tract and convey another. *Brigance v. Erwin's Lessee*, 779.
3. **IT MUST APPEAR FROM LEVY OF EXECUTION ON LAND**, and from sheriff's deed, that the land named in each is the same. *Id.*
4. **PAROL EVIDENCE, EXCEPT IN CASE OF LATENT AMBIGUITY, IS IN GENERAL INADMISSIBLE** to show the identity of land levied on under execution. *Id.*
5. **LEVY INDORSED ON EXECUTION IS VOID FOR UNCERTAINTY IN DESCRIPTION** of land levied on, if in the words: "Levied, twentieth August, 1825, on nineteen hundred and fifty acres of land, in Henderson county, part of a tract of two thousand five hundred acres located by Daniel Gilchrist," and sale thereon vests no title in the purchaser. *Id.*
6. **THERE IS NO PRESUMPTION THAT ENTRY ON LAND LEVIED ON** was made in debtor's name, in the absence of any statement in the levy to that effect, for he may be a purchaser as well as an enterer. *Id.*
7. **SHERIFF CAN SELL AND DELIVER NO PART OF PARTNERSHIP GOODS**, under an execution at the suit of a judgment creditor of one partner, but only the contingent interest of the debtor partner in the stock and profits after settlement of partnership accounts and payment of partnership creditors. *Deal v. Bogue*, 702.
8. **OFFICER CAN PASS TITLE BY SALE UNDER WRIT** wherever he can justify under the writ, if all other prerequisites to a sale have been complied with. *Coleman v. McAnulty*, 229.
9. **FAILURE OF SHERIFF TO GIVE NOTICE REQUIRED BY STATUTE OF SALE** does not affect the title of a *bona fide* purchaser, as the purchaser is not affected by any irregularities in the sheriff's proceedings in making a sale under execution, unless he has participated in occasioning it, or there has been some departure from the law for some fraudulent purpose. *Draper v. Brym*, 257.
10. **PURCHASER AT SHERIFF'S SALE IS NOT AFFECTION BY ANY ERROR OR IRREGULARITY** in the judgment or other proceedings, unless it is of a character to render the whole proceeding a nullity. *Id.*
11. **PURCHASER OF LAND AT EXECUTION SALE ACQUIRES SUCH TITLE** only as the execution debtor had. *Gingrich v. Foltz*, 631.
12. **SALE MADE UNDER EXECUTION ISSUED AFTER DEATH OF DEFENDANT**, without a revival of the judgment, is not void, but only voidable; and such sale will be valid until regularly set aside by an action for that purpose brought by the heir or the terre-tenant. *Doe ex dem. Shelton v. Hamilton*, 149.
13. **LEVY ON PERSONAL PROPERTY SUFFICIENT TO SATISFY EXECUTION** is prima facie a satisfaction of it. *Id.*
14. **DISPOSITION OF ENTIRE FUND RAISED ON EXECUTIONS ISSUED OUT OF SEVERAL COURTS** may lawfully be assumed by that one of the courts into which the money is paid by the sheriff, either voluntarily or by consent of parties, when there is a question upon which one of the executions the money is actually made, or to which of several plaintiffs in executions it is payable. *Woodruff v. Chapin*, 416.

- 15. PURCHASER AT SHERIFF'S SALE DOING ANY ACT PREVENTING FAIR COMPETITION** vitiates the sale, and obtains no title; as where the purchaser at such a sale, being a mortgagee of the same land, exhibited his mortgage at the sale and proclaimed that the sale was only to complete the title, that is to say, that it was a sale of the equity of redemption only, when in fact the debtor's entire estate was on sale, and thereby obtained the land at a nominal price. *Martin v. Ranlett*, 770.
- 16. SUBSEQUENT EXECUTION PURCHASER MAY SHOW FRAUD IN PRIOR EXECUTION SALE** of the same land, whereby the prior purchaser prevented competition and obtained the land at a nominal price, in trespass to try title, without having the prior sale set aside; and the finding of fraud by the jury in such a case will not be disturbed. *Id.*
- 17. CONTINUED POSSESSION OF PERSONAL PROPERTY, AFTER EXECUTION SALE,** by former owner, is presumptive evidence of fraud, and becomes conclusive, unless the vendee shows that the sale was made in good faith and without intent to defraud creditors. *Kuykendall v. McDonald*, 212.
- 18. OFFICER SERVING VALID EXECUTION AFTER PAYMENT** of the amount by the debtor to the plaintiff in the writ, although the debtor shows such officer a receipt in full, is not liable in trespass or case if not notified by the execution plaintiff not to serve it. *Twitchell v. Shaw*, 80.
- See** EQUITY, 11; ESTOPPEL, 3; EVIDENCE, 3; HUSBAND AND WIFE, 3; LAND-LORD AND TENANT, 7; MARRIED WOMEN, 6, 7; PLEADING AND PRACTICE, 1, 2, 11; PARTNERSHIP, 6; TRESPASS, 3.

EXECUTORS AND ADMINISTRATORS.

- 1. ADMINISTRATOR AND HEIRS OF DECEDENT TAKE SAME RIGHT AND INTEREST** in decedent's estate as decedent had. *Kennerly v. Shepley*, 219.
- 2. EXECUTOR IS APPOINTED TO TAKE CARE OF INTEREST OF ALL CONCERNED,** and is as much bound to see that the remainderman is not deprived of his interest as that the tenant for life shall enjoy his. *Saunders v. Haughton*, 581.
- 3. IF ESTATE FOR LIFE WITH REMAINDER OVER IS GIVEN IN PROPERTY CONSUMED IN USE,** it is the duty of the executor to sell the property, and to pay over the interest to the tenant for life; but if the executor consents to the legacy, and the property remains in the hands of the life tenant, and an increase takes place while in the possession of the tenant for life, it belongs to him, and the remainderman is only entitled to what remains of the original stock. *Id.*
- 4. EXECUTOR OR ADMINISTRATOR IS FULL REPRESENTATIVE OF CREDITORS** of the estate committed to his care in the prosecution and defense of claims. *Kennerly v. Shepley*, 219.
- 5. IN ACTION BROUGHT TO RESTRAIN ADMINISTRATOR** from selling property to pay debts of a deceased person and to set up a lost deed, it is sufficient if the administrator and the heirs are brought before the court, as they fully represent the property and are liable for all demands against it. *Id.*
- 6. ADMINISTRATOR OF MOTHER** EDUCATION of her child ^{can not set up claim for support and} child against the administrator, as guardian for him, where he ^{lived on him by herself, in an action by the} as guardian for him, where he ^{to recover a sum received by the mother} to make a charge for them; ^{there is no evidence that she ever intended} ^{bd in such a case the omission of the mother}

- to render an account of the sums received by the child can not be construed into a purpose to apply them for his education. *Gunion v. Gunion's Adm'r*, 223.
7. EXECUTORS IN BRINGING ACTION TO FORECLOSE MORTGAGE due the estate of their testator should not only allege in their declaration that they were the executors, but should also allege the death of their testator, the probate of the will, their interest or right in the action, and an averment of such facts as are necessary to sustain the action. *Middleworth v. Nixon*, 136.
8. EXECUTORS ARE PRECLUDED FROM PROVING THEIR OFFICE by general reputation in actions brought to recover debts due their testators' estates. *Id.*
9. LICENSE BY PROBATE COURT TO ADMINISTRATOR TO SELL REAL ESTATE need not fix the sum of money to be raised at the sale, if, although the property is more than sufficient to pay the demands, it is so situated that a part of it can not be sold without injury to the persons interested therein, under the New Hampshire statute; notwithstanding another provision of the same statute that the probate judge, in a license to sell the decedent's real estate, shall fix the sum of money to be raised at the sale. *Merrill v. Harris*, 359.
10. SUFFICIENCY OF EVIDENCE OF DEBT TO WARRANT ISSUANCE OF LICENSE to sell decedent's realty is a matter within the jurisdiction and discretion of the probate judge, the petition being in due form, and regular and legal notice having been given to the heirs and all concerned; and his decision thereupon can not be inquired into collaterally. *Id.*
11. ALL CLAIMS MUST BE LIQUIDATED BY EITHER CONFESSION OR JUDGMENT before they can be recovered by suit on a probate bond of an administrator or executor. *Id.*
12. COVENANTS MADE BY ADMINISTRATOR WITH PURCHASERS OF DECEDENT'S PROPERTY are personal, and do not subject to liability sureties on his bond. *Id.*
13. ADMINISTRATOR CAN NOT BECOME PURCHASER of the estate or effects of his intestate. *Dwight v. Blackmar*, 130.
14. QUESTION OF INTEREST OR FAIRNESS CAN NOT BE CONSIDERED in sale of intestate's estate to administrator, inasmuch as such sales are void. *Id.*
15. BY CONFIRMATION OF ADMINISTRATOR'S SALE by the court his liability to the heirs for the purchase price becomes fixed, and he acquires the right to recover from the purchaser. *Sackett v. Twining*, 599.
16. IT IS DUTY OF PURCHASER OF LAND AT ADMINISTRATOR'S SALE TO MEASURE SAME before the sale is confirmed. Having failed to do so, and accepting a deed for the land, paying part of the purchase price and giving a bond for the balance, he is not entitled to a deduction from the bond because there were a few less acres than at first supposed. *Id.*
17. ORDER OF PROBATE COURT CONFIRMING EXECUTORS' SALE must be treated as final and conclusive until reversed or vacated. *Bland v. Muncaster*, 162.
18. FAILURE OF EXECUTORS TO GIVE NOTICE OF SALE prescribed by the statute does not render the sale void. *Id.*
19. PURCHASE BY EXECUTOR ON SALE OF TESTATOR'S PROPERTY IS VOIDABLE, but not void; the sale can be set aside at the suit of a creditor only upon his showing that it was not fairly made, and that without a resale, the estate would be insufficient to pay the debts existing against it. *Id.*

20. PURCHASE BY EXECUTOR ON SALE OF TESTATOR'S PROPERTY IS VALID AFTER CONFIRMATION by the probate court, until the order of confirmation is in a proper manner vacated, and this can not be done in a collateral proceeding in the circuit court except for fraud in procuring the order. *Id.*
 21. ONE SELLING GOODS TO EXECUTOR PERSONALLY AND TAKING NOTE DUE ESTATE in payment, with full knowledge of the facts, is liable to an administrator *de bonis non* for the proceeds of the note. *Smith v. Fortescue*, 593.
 22. EXECUTOR DE SON TORT WILL NOT BE PERMITTED, in action of trover brought by administrator, to give in evidence in mitigation of damages payments of debts to the value of goods still in his possession, nor will he be permitted to retain them in satisfaction of his own debt. *Hardy v. Thomas*, 152.
 23. EXECUTOR DE SON TORT MAY PROVE CLAIM against the estate for sums paid out by him while acting in that capacity, and may demand payment from the administrator ratably with other creditors. *Id.*
- See ATTACHMENTS, 3, 4; ESTATES OF DECEDENTS; GUARDIAN AND WARD, 1; HUSBAND AND WIFE, 1, 2; INSURANCE—FIRE, 2; MARRIED WOMEN, 13; PARTNERSHIP, 11; WITNESSES, 2.

EXECUTORS DE SON TORT.

See EXECUTORS AND ADMINISTRATORS, 22, 23.

EXEMPTIONS.

See COMMON CARRIERS, 3, 4; TAXATION.

EXPLOSIONS.

See INSURANCE—FIRE, 6, 9.

EXTRADITION.

See FUGITIVES FROM JUSTICE.

FACTORS.

1. FACTOR WHO DOES NOT ACCEPT TERMS ON WHICH CONSIGNMENT TO HIM IS MADE can not resist such other disposal of the goods as the consignor may make. *Winter v. Coit*, 522.
2. FACTOR'S LIEN FOR GENERAL BALANCE DOES NOT ATTACH (unless by some agreement of the parties) until the goods come to his possession. *Id.*
3. FACTOR WHO ACCEPTS CONSIGNMENT ACCOMPANIED BY INSTRUCTIONS TO "SELL ON ARRIVAL," is bound to do so; and if he postpones selling, he will be liable for any loss sustained through a fall in prices. *Evans v. Ross*, 512.
4. DIRECTION "TO SELL ON ARRIVAL" IS EXPLICIT INSTRUCTION. *Id.*

FALSE IMPRISONMENT.

See PLEADING AND PRACTICE, 12.

FEDERAL COURTS.

See CONSTITUTIONAL LAW.

FER.

See DUNES; HIGHWAYS; LANDLORD AND TENANT, 8-10; PARTITION, 3; WILLS, 8.

FEMES COVERT.

See MARRIED WOMEN.

FENCE.

See RAILROADS, 7.

FIRE INSURANCE.

See INSURANCE—FIRE.

FLATS.

See WATERCOURSES, 11.

FORECLOSURE.

See EXECUTORS AND ADMINISTRATORS, 7; VENDOR AND VENDER, 4.

FORFEITURE.

See BAILEMENTS, 3; BANKS AND BANKING, 1-3; BONDS; CORPORATIONS, 9, 12; TRUSTS AND TRUSTEES, 7.

FORGERY.

See CORPORATIONS, 7.

FRAUD.

1. FRAUDULENT INTENT IS QUESTION FOR JURY. *Kuykendall v. McDonald*, 212.

2. PLAINTIFF FAILING TO PROVE FRAUD ALLEGED IN BILL as a ground of relief can not claim relief on independent grounds stated, upon which relief might have been afforded if fraud had not been alleged; as where fraud and failure to account are charged against an agent, and the fraud is not proved. *Mount Vernon Bank v. Stone*, 709.

3. PARTY WHO EXECUTES CONTRACT FOR PURPOSE OF DEFRAUDING his neighbor will not be protected against it when it is used against himself. *Rankin v. Simpson*, 668.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 3; AUCTIONS; BANKS AND BANKING, 7; BONA FIDE PURCHASERS; ESTOPPEL, 6; EXECUTIONS, 9, 15-17; EXECUTORS AND ADMINISTRATORS, 19, 20; FRAUDULENT CONVEYANCES; GUARDIAN AND WARD, 3; INFANCY, 10; JUDGMENTS, 4; MARRIED WOMEN, 5; PUBLIC LANDS, 3; RELEASES, 2; SALES, 3; STATUTE OF FRAUDS, 1; WILLS, 4.

FRAUDULENT CONVEYANCES.

1. VOLUNTARY SETTLEMENT IS NOT REVOCABLE. *Lisloff v. Hart*, 203.

2. DEED MADE TO HINDER, DELAY, AND DEFRAUD CREDITORS is void. *Id.*

3. To show that sale was without consideration and fraudulent as to creditors, evidence of the declarations of the vendor while in possession of the property that he was not much indebted is admissible, when

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- the consideration of the sale was a vendor to the vendee. *Salterwhite*.
- 4. **PARTY ALLEGING FRAUD MUST PROVE** rule does not extend to a case where power to pay, and a writ had issued from him, and he then sells to his buyer to be fraudulently conveyed, and smartly indebted to the vendee, and different dates, executed by him to the buyer.
 - 5. **MONEYED CONSIDERATION FOR GOODS** - **VALUE** will not take a case out of reasonably inadequate. *Kuykendall*
 - 6. **RECORDING ABSOLUTE BILLS OF SALE** authorized act, avails the parties not raised. *Id.*
 - 7. **DECREE IN CREDITOR'S SUIT** BOUND TO REALTY for fraud against creditors assignment void, but may order the defendant to convey the lands to a receiver; and empowered to sell for complainant's benefit. *White*, 442.

See ATTACHMENTS, 1, 2; EQUITY, 11; EXCESSIONS

FREIG.

See COMMON C.

FUGITIVES FROM JUSTICE

- 1. **SURRENDER OF FUGITIVE FROM JUSTICE** MEMBER OF CONFEDERACY by art. IV, § 2, clause 2, of the Constitution of the United States, which provides that in another state "shall, on demand of the government of the state from which he fled, be delivered up to the government having jurisdiction of the crime;" but the clause is a regulation of a previously existing law.
- 2. **SOVEREIGN STATE HAS RIGHT TO SURRENDER AGAINST LAWS OF LATTER**, opinion in regard to its obligation so to do.
- 3. **POWER OF ARRESTING AND DETAINING FUGITIVES** EXISTS OF NECESSITY, i.e., if a fugitive from justice enters a state, independent of constitutional obligation, it has the right to arrest and detain such fugitive, and this power is in support of an express constitutional obligation. *Id.*
- 4. **FUGITIVE FROM JUSTICE FROM ANY STATE AND DETAILED IN ANOTHER STATE**, if the fugitive has committed a crime in one state, and the prosecution is actually made by the government of the state in which he committed. *Id.*
- 5. **CRIME MAY BE STATUTORY**, warrant detention or surrender depending on the constitution of the state.

6. FUGITIVE FROM JUSTICE FROM ONE STATE WILL BE DETAINED IN ANOTHER, where, although the original affidavit upon which the warrant issued was defective in not alleging that any crime had been committed in the state from which he was claimed to be a fugitive, it appeared by a subsequent affidavit and evidence adduced that the alleged crime was committed therein. *Id.*
7. FUGITIVE FROM JUSTICE FROM ONE STATE DETAINED IN ANOTHER ORDERED DISCHARGED, when it appeared that a sufficient time had elapsed since the commitment for a demand for a surrender of the prisoner by the executive of the state where the crime was committed. *Id.*

GAMING.

1. GAMING TRANSACTIONS ARE VIEWED WITH STRONGER CONDEMNATION by the courts of South Carolina than by the English courts. *Bledsoe v. Thompson*, 777.
2. LOSER MAY RECOVER FROM STAKE-HOLDER MONEY BET by him on a horse-race, on demanding it before it is paid over. *Id.*

GARNISHMENT.

See ATTACHMENTS.

GENERAL ISSUE.

See PLEADING AND PRACTICE, 1.

GIFTS.

See HUSBAND AND WIFE, 1, 2.

GRANTS.

See PUBLIC LANDS.

GROWING TREES.

See LANDLORD AND TENANT, 1, 2; RAILROADS, 1, 2.

GUARDIAN AND WARD.

1. APPOINTMENT TO OFFICE OF GUARDIAN OR ADMINISTRATOR IS VOID where the same has been exercised previously, and the party so appointed has not been removed, nor the office declared vacant. *Thomas v. Burris*, 154.
 2. GUARDIAN MAINTAINING WARD CAN NOT EXCEED ANNUAL INCOME OF WARD'S PROPERTY in the state. *Barnes v. Ward*, 590.
 3. CONSIDERATION OF RELEASE UNDER SEAL GIVEN BY WARD TO GUARDIAN will be inquired into in a court of equity, and the guardian will be restrained from defending under it in an action at law for an accounting where it was obtained by fraud. *Id.*
- See EXECUTORS AND ADMINISTRATORS, 6; PARENT AND CHILD.

HEIRS.

See EXECUTORS AND ADMINISTRATORS, 1, 5.

HIGHWAYS.

OWNER OF LAND TAKEN FOR PUBLIC WAY OWNS FEE, AND HERBAGE, trees, or minerals upon or within it, subject, however, to the public use for

the purposes for which it was taken and incidental purposes. *Brainard v. Clapp*, 74.

See CORPORATIONS, 13, 14.

HOLIDAYS.

See BAILMENTS, 2; SUNDAYS.

HUSBAND AND WIFE.

1. HUSBAND MAY MAKE GIFTS OR PRESENTS TO HIS WIFE, which will be supported in equity against himself and his representatives. *Garner v. Garner*, 583.
2. IMPERFECT DEED OF SLAVES BY HUSBAND TO WIFE will be enforced, after his death, against his children and his executor, where he had already made advancements to his children, when from the time of the deed until the grantor's death, and for a long time subsequently, the wife had been in undisturbed possession of the slaves, and the executor of the grantor will be regarded as the trustee for the wife. *Id.*
3. HUSBAND HAS ESTATE FOR LIFE, IN ALABAMA, IN SLAVE bequeathed by a testator to his daughter and her husband during their natural lives, free from the debts of the husband, and to the survivor during his or her natural life, and the slave is subject to sale on execution against him. *Sale v. Saunders*, 157.
4. NOTE MADE PAYABLE TO FEME COVERT IS HUSBAND'S ABSOLUTE PROPERTY. *Stevens v. Beals*, 108.
5. WIFE INDORSING IN HER OWN NAME NOTE MADE PAYABLE TO HER DURING COVERTURE passes a good title if it be done with the husband's assent; otherwise not. *Id.*
6. HUSBAND MAY PURCHASE LAND IN WHICH WIFE HAS SHARE, AT PARTITION SALE decreed by the court, and hold the same clear of any title or claim on the part of the wife, but over the wife's interest in the purchase money he has no control further than is permitted by the wife or authorized by an order of court. *Ex parte Geddes*, 730.
7. ACTION BY HUSBAND AND WIFE FOR PERSONAL INJURY TO WIFE is properly brought. *Thomas v. Winchester*, 455.

See DOWER; MARRIED WOMEN; PARENT AND CHILD.

ILLEGAL CONTRACTS.

See SUNDAY; TROVER.

IMPEACHMENT.

See WITNESSES, 6.

IMPLIED COVENANTS.

See LANDLORD AND TENANT, 4; PARTITION, 5.

IMPLIED TRUSTS.

See TRUSTS AND TRUSTERS, 8.

IMPERFECT COVENANTS.

See COVENANTS, 6; EVIDENCE, 6; MARRIED WOMEN, 4, 5.

INCUMBRANCES.**See COVENANTS, 7-10; NOTICE.****INDEPENDENT COVENANTS.****See LANDLORD AND TENANT, 6.****INDORSEMENTS.****See ASSIGNMENTS OF CONTRACTS, 4, 5; HUSBAND AND WIFE, 5; INFANCY, 3; NEGOTIABLE INSTRUMENTS, 4-9, 14, 16; WITNESSES, 1.****INFANCY.**

- 1. CONDITIONAL PROMISE TO PAY OR PERFORM CONTRACT MADE UNDER AGE** can not be enforced until the happening of the contingency, or the performance of the condition, but then the new contract becomes absolute and the original contract is ratified, and the plaintiff may declare upon either. *Edgerly v. Shaw*, 349.
- 2. PROMISE MADE AFTER MAJORITY BY MAKER OF PROMISSORY NOTE EXECUTED IN INFANCY** to pay it at the end of a specified time in labor or else in money is a conditional promise, and becomes absolute upon the expiration of the specified time whereby the original contract is confirmed and the promisor made liable to suit on either contract. *Id.*
- 3. PROMISSORY NOTE MADE BY INFANT IS NEGOTIABLE AFTER CONFIRMATION**, and an action thereon will lie in the name of the indorsee. *Id.*
- 4. EXECUTORY CONTRACT OF INFANT MAY BE RATIFIED BY EXPRESS PROMISE** or by such acts as evince an intention to be bound by it; but a mere acknowledgment is not enough. *Id.*
- 5. EXECUTORY CONTRACT OF INFANT IS INVALID UNTIL RATIFIED;** executed contract of infant is binding until avoided. *Id.*
- 6. EXPRESS PROMISE TO PAY DEBT OR PERFORM AGREEMENT** contracted during minority may be either absolute or partial, qualified or conditional. *Id.*
- 7. PARTIAL, QUALIFIED, OR CONDITIONAL PROMISE TO PAY CONTRACT** entered into in infancy is a new promise founded upon the original consideration, and not a ratification of the old one, and it must be declared upon as a new promise. *Id.*
- 8. ACTION AGAINST ADULT ON CONTRACT MADE BY HIM WHEN INFANT** can not be sustained, unless after majority there be an express ratification, either by a new promise to pay or by such positive acts as amount to an express and unequivocal promise. The rule is more stringent than where the defense is the statute of limitations. *Tibbets v. Gerriek*, 307.
- 9. PROMISE BY ADULT TO PAY NOTE MADE IN INFANCY**, if he signed it, is competent evidence, the signature having been admitted, to remove the bar of infancy. *Id.*
- 10. ACTUAL AND POSITIVE FRAUD OF INFANT CAN BE COMMITTED ONLY BY SOME UNEQUIVOCAL ACT,** and not merely inferred by his silence or acquiescence, and it should appear that he had full knowledge of his rights, and that he possessed such discretion and intelligence as to enable him to comprehend the import and effect of his conduct in reference to his rights, as in the case of adults. *Barham v. Turbeville*, 782.

See ESTOPPEL, 4-6.

INJUNCTIONS.

1. INJUNCTION AGAINST PROCEEDINGS IN ANOTHER COURT is an auxiliary writ to restrain parties from proceedings before the ordinary tribunals, where equitable elements are involved in the dispute. *Barnes v. Ward*, 590.

2. INJUNCTION AGAINST PLEADING AT LAW RELEASE UNDER SEAL will be granted where the release is without consideration and it is contrary to equity and good conscience so to use it. *Id.*

See EQUITY, 8; EXECUTORS AND ADMINISTRATORS, 5; GUARDIAN AND WARD, 3; RELEASES, 2.

INSANITY.

See WILLS, 4.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

See AGENCY, 2; FACTORS, 3, 4; INVENTIONS, 5; JUDGMENTS, 7; JURY AND JURORS; NEGOTIABLE INSTRUMENTS, 11; PLEADING AND PRACTICE, 13-16.

INSURANCE—FIRE.

1. PROVISIONS OF CHARTER OF INSURANCE COMPANY constitute part of the policy. *Burbank v. Rockingham etc. Ins. Co.*, 300.

2. POLICY OF INSURANCE CONDITIONED TO BECOME VOID UPON ALIENATION by the assured is not so avoided by his death, and the consequent charge and control of his property by his administrator, or by descent to his heirs. *Id.*

3. ALIENATION OF INSURED PROPERTY IN VIOLATION OF PROVISIONS OF POLICY avoids it. Should not a subsequent collection of assessments by the insurer, with knowledge, constitute an election to continue the policy in force? *quære. Id.*

4. AGREEMENT BY INSURER, MADE DURING TERM TIME, entitled in the cause that certain property belonged to the insured becomes part of the record, is a solemn admission of the fact, and estops said insurer from denying said fact. *Id.*

5. AGREEMENT BETWEEN DIFFERENT OWNERS OF PROPERTY that one of them shall take out insurance upon said property in his own name does not amount to double insurance. *Id.*

6. FIRE INSURANCE POLICY COVERS DAMAGE BY IGNITION AND EXPLOSION OF GUNPOWDER in an insured building. *Scripture v. Lowell Mut. F. Ins. Co.*, 111.

7. FIRE INSURANCE POLICY DOES NOT COVER DAMAGE BY OVERHEATING, without combustion, by the unskillful use of fire in a factory. *Per Cushing, J., arguendo. Id.*

8. FIRE INSURANCE POLICY DOES NOT COVER LOSS BY LIGHTNING, without the exhibition of fire. *Per Cushing, J., arguendo. Id.*

9. FIRE INSURANCE POLICY DOES NOT COVER LOSS BY EXPLOSION OF STEAM or other agent acting by explosion without combustion. *Per Cushing, J., arguendo. Id.*

INSURANCE—LIFE.

1. CREDITOR OF FIRM HAS INSURABLE INTEREST IN PARTNER'S LIFE, the insurance being less than the debt, and may recover the whole amount from the insurers, where the debt is due and unpaid at the death, though the estates of both partners are solvent. *Morrell v. Trenton etc. Ins. Co.*, 92.
2. PARTY INTERESTED IN ANOTHER'S EARNINGS HAS INSURABLE INTEREST IN LATTER'S LIFE, it seems, where the latter, for a valuable consideration, has agreed to work a year in the mines and to give the former a quarter of what he makes, and upon the loss of the insured life within the year the whole insurance money is recoverable. *Id.*

INTEREST.

See COVENANTS, 5, 9; EXECUTORS AND ADMINISTRATORS, 8.

INTERNATIONAL LAW.

See FUGITIVES FROM JUSTICE.

INTERPRETATION.

See CONTRACTS, 2; STATUTES.

INVENTIONS.

1. PATENT MAY BE VALID, although some parts of the machine described were not the original invention of the patentee. *Holliday v. Rheem*, 628.
2. IF ANYTHING BE INCLUDED IN PATENT WHICH IS NOT NEW, or if the patent covers any material or substantial part of a machine which the patentee did not invent or discover, the patent is void. *Id.*
3. VALID PATENT MAY BE OBTAINED UPON NEW COMBINATION of existing principles or machines. *Id.*
4. ONE WHO OBTAINS PATENT UPON TWO APPLIANCES UPON WATER-WHEEL, when said patent is attacked, must show that each of said appliances is new, or his patent is void. *Id.*
5. INSTRUCTION THAT IF THERE IS ANYTHING NEW IN INVENTION a patent obtained upon it is valid, is erroneous. *Id.*

JOINDER OF PARTIES.

See ATTACHMENTS, 2, 8-10; PLEADING AND PRACTICE, 2.

JOINT TENANTS.

See PARTITION, 5.

JUDGMENTS.

1. NEW HAMPSHIRE STATUTE PROVIDING THAT UPON DEFAULT OF PARTY judgment shall be rendered against him for such damages as, upon inquiry, the plaintiff shall appear to have sustained, contemplates the reception of evidence upon the question of damages after a default. *Willson v. Willson*, 320.
2. JUDGMENT AGAINST DEBTOR DOCKETED AFTER ASSIGNMENT TO RECEIVER, pursuant to an order of court in a creditor's suit, of land alleged to have been fraudulently conveyed away by such debtor, is not a lien thereon. *Chautauque Co. B'k v. White* 442.

- 2. FORMER JUDGMENT BETWEEN SAME PARTIES IS ADMISSIBLE IN EVIDENCE** in an action pending between them, if it appears that the fact sought to be proved by the record was actually passed upon by the jury in finding their verdict in the former suit. Hence, where the fact sought to be proved is that A. and B. were copartners under the firm name of A. & Co. at the time when the note in suit was given in the name of that firm, a former judgment obtained by the same plaintiffs, against A. and B. on a note executed at the same time with the note in suit, and in the same firm name, is admissible, though not conclusive, evidence. *Dutton v. Woodman*, 46.
- 4. JUDGMENT CAN NOT BE IMPEACHED COLLATERALLY**, in a subsequent action for damages, by proof that the plaintiff in it, while suit was pending, practiced deceit upon defendant, whereby the latter was led to forbear interposing a defense fraudulently concealed from him. *White v. Merrill*, 527.
- 5. OBJECTION THAT SERVICE OF SCIRE FACIAS TO REVIVE JUDGMENT WAS VOID**, because, instead of having a sheriff's return of service upon it, it had an acknowledgment signed by the administrator, that it was personally served upon him, and that consequently the judgment was a nullity, can not be made so as to defeat an action of ejectment brought by a purchaser on execution under the judgment. *Draper v. Bryson*, 257.
- 6. WHERE PARTY IS NOT WITHIN JURISDICTION OF COURT AND IS NOT SERVED** with process, or does not voluntarily appear and answer to the suit, by himself or his attorney, the judgment can not be enforced against him out of the local jurisdiction. *Phelps v. Brewer*, 58.
- 7. JUDGMENT SHOULD NOT BE REVERSED FOR ERROR IN IMMATERIAL INSTRUCTIONS.** *Walters v. Jordan*, 558.
- 8. PROCEEDINGS TO SET ASIDE JUDGMENT DO NOT AFFECT ONE NOT PARTY.** *Coleman v. McAnulty*, 229.
- See ATTACHMENTS, 1, 2, 4, 6, 7, 11-13; BANKS AND BANKING, 1-3; CONTRIBUTION, 2; CORPORATIONS, 9, 12; EQUITY, 11; ESTATES OF DECEDEENTS; ESTOPPEL, 1; EXECUTIONS, 7, 10, 12; EXECUTORS AND ADMINISTRATORS, 11; FRAUDULENT CONVEYANCES, 7; MARRIED WOMEN, 23; PARTNERSHIP, 3, 4, 6; PLEADING AND PRACTICE, 12; PROBATE COURTS; SPECIFIC PERFORMANCE; TRUSTS AND TRUSTEES, 7, 8; WILLS, 1, 2.

JUDICIAL SALES.

See PARTITION, 2; PROBATE COURTS, 4.

JURISDICTION.

See EXECUTORS AND ADMINISTRATORS, 10; JUDGMENTS, 6; MARRIED WOMEN, 23; PARTNERSHIP, 3, 4; PROBATE COURTS; TRUSTS AND TRUSTEES, 7; WILLS, 11.

JURY AND JURORS.

JURY MUST FOLLOW INSTRUCTIONS OF COURT in rendering a verdict. *Doe d. Shelton v. Hamilton*, 149.

See BANKS AND BANKING, 1; CRIMINAL LAW, 3; FRAUD, 1; NEGLIGENCE, 1; PLEADING AND PRACTICE, 12-16; RAILROADS, 4.

JUSTIFICATION.
See EXECUTIONS, 8; PROBATE COURTS, 4; RAILROADS, 2; TREASURER, 2.

LANDLORD AND TENANT.

1. TURPENTINE TREES MAY BE LEASED. *Roche v. Moore*, 509.
2. LEASE OF TURPENTINE TREES IS CREATED by a contract by which the owner agrees that another person may cultivate them, and dip the trees, and have the boxes for a year, and the latter agrees to pay to the owner one fourth of the turpentine. *Id.*
3. CLAUSE IN LEASE THAT OWNER SHALL NOT BE LIABLE "FOR ANY REPAIRS whatsoever on said premises during the term, the house being now in perfect order," has respect to its condition as an edifice in perfect repair, and not to the present or future state of the air within it. *Foster v. Peyster*, 43.
4. IN SEALED LEASE OF HOUSE FOR PRIVATE RESIDENCE there is no implied covenant that it is reasonably fit for habitation. *Id.*
5. COVENANT IN LEASE THAT TENANT SHALL HAVE REFUSAL OF THE PREMISES for another term, saying nothing about the rent for such renewed term, binds the landlord to give a renewal at the same rent. *Tracy v. Albany Exchange Co.*, 538.
6. RENEWAL OF LEASE MAY BE CLAIMED BY TENANT, under an independent covenant in the lease that he shall have one, notwithstanding the original term has not yet expired, and notwithstanding some rent remains due from him to the landlord on account of the original term. *Id.*
7. PURCHASER AT EXECUTION SALE OF LESSEE'S INTEREST IN LEASE IS LIABLE FOR RENT reserved to the lessor, and this whether he had possession or not; for if he suffer the original lessee to remain in possession, it is his voluntary act. *Smith v. Brinker*, 265.
8. LEASE OF LAND IN FEE RESERVING RENT CREATES FEE-SIMPLE ESTATE, or what was anciently termed a fee-farm estate. *De Peyster v. Michael*, 470.
9. RESTRAINTS ON ALIENATION IN LEASES IN FEE reserving rent are just as invalid as similar conditions in ordinary grants in fee, as where such a lease contains a condition for payment by the lessee of a quarter of the sale money to the lessor, his heirs, etc., in case of alienation with a right of re-entry for non-payment. *Id.*
10. CONDITIONS IN RESTRAINT OF ALIENATION IN LEASES for lives or years are lawful. *Id.*

See DEEDS, 12, 13; RAILROADS, 3; STATUTE OF FRAUDS, 3; WILLS, 16, 17.

LARCENY.

See CRIMINAL LAW, 4, 5.

LATENT AMBIGUITIES.

See EXECUTIONS, 4.

LEASES.

See DEEDS, 12; LANDLORD AND TENANT; RAILROADS, 3.

LEGACY.

See EXECUTORS AND ADMINISTRATORS, 3; WILLS.

LETTERS.

See EVIDENCE, 2, 5.

LEVY.

See EXECUTIONS, 2-6, 12.

LIBEL.

1. CORPORATION ASSEMBLE MAY MAINTAIN ACTION FOR LIBEL for words published of it in the way of its trade or business, or of its property and concerns, or of its officers, servants, or members, by reason of which special damage is sustained by the corporation. *Trenton etc. Ins. Co. v. Perrine*, 400.
2. SPECIAL DAMAGE FOR LOSS OF BUSINESS THROUGH LIBEL MAY BE ASSESSED GENERALLY, without stating the names of customers lost, where the individuals may be supposed to be unknown to the plaintiff, or where it is impossible to specify them, or where they are so numerous as to excuse a specific description. *Id.*

LICENSES.

1. PAROL LICENSE, TO BE EXERCISED UPON LANDS OF ANOTHER, is a mere personal trust and confidence, and is not assignable; and although it may be binding between the parties, it will not pass to a purchaser. It is not an easement carrying an interest in the land; it is a mere permission to one to do an act, and does not confer an authority upon others to do such act or exercise the same license. *Cowles v. Kidder*, 287.
2. PAROL LICENSE TO BUILD DAM EXPIRES with the decay of the dam, and gives no right to repair or re-erect it. *Id.*

See EXECUTORS AND ADMINISTRATORS, 9, 10; RAILROADS, 6.

LIENS.

See ATTACHMENTS, 1; DEBTOR AND CREDITOR; ESTATES OF DECEDENTS; ESTOPPEL, 1; FACTORS, 2; JUDGMENTS, 2; MORTGAGES, 1, 4; NEGOTIABLE INSTRUMENTS, 17; PARTNERSHIP, 12.

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MARINE PROTEST.**See EVIDENCE, 8.****MARRIAGE AND DIVORCE.****See DEEDS, 2; MARRIED WOMEN, 13, 14.****MARRIED WOMEN.**

- 1. WIFE MAY WAIVE HER EQUITY IN MONEY ARISING FROM SALE OF HER LAND** under a decree of court for the purpose of partition, by joining with her husband in a receipt therefor; and if she does this, the marital rights of the husband attach. *Ex parte Geddes*, 730.
- 2. WIFE'S TITLE OR INTEREST IN HER LAND CEASES, AND ATTACHES UPON MONEY ARISING FROM SALE**, when the land is sold for the purpose of partition, under a decree of court. *Id.*
- 3. PURCHASES MADE BY HUSBAND IN WIFE'S NAME** during coverture will be treated as advancements made to her separate use, provided they are made in good faith, and with no intention to defraud creditors. *Warren v. Brown*, 191.
- 4. MARRIED WOMAN HAS NO RIGHT OF PRE-EMPTION** when her husband was alive, and had for a valuable consideration sold the improvements erected on the claim, to another, under whom the wife claimed. *Groves' Heirs v. Fulsome*, 247.
- 5. MARRIED WOMAN OBTAINING PATENT FROM GOVERNMENT WILL BE REGARDED AS TRUSTEE** of one who had entered the land, and finding her in possession without any claim to a right of pre-emption, had paid her for her improvements, and for yielding possession to his vendee, if with the money thus obtained she entered a claim of pre-emption, and obtained the patent. *Id.*
- 6. WIFE BY VIRTUE OF HER SURVIVORSHIP CAN MAINTAIN ACTION** for slave against a purchaser at an execution sale of the slave against her husband, where the slave was bequeathed to her and her husband for their natural lives and to the survivor during his or her natural life. *Sale v. Saunders*, 157.
- 7. REVERSIONARY INTEREST OF WIFE IN PERSONAL PROPERTY** or an estate limited to her upon a condition which can not take effect until the death of the husband is not subject to sale on execution for the debts of the husband; therefore, where a slave is bequeathed to the testator's daughter and her husband for their natural lives and to the survivor during his or her natural life, the estate which the wife takes by virtue of her survivorship is not subject to sale on execution against the husband during his life. *Id.*
- 8. MARRIED WOMAN'S WILL DISPOSING OF HER FREEHOLD ESTATES IS VOID** at common law. *Cutter v. Butler*, 330.
- 9. MARRIED WOMAN MAY DEVISE LANDS BY INSTRUMENT IN NATURE OF WILL** when they are placed in the hands of trustees subject to her disposal by will. *Id.*
- 10. MARRIED WOMAN MAY DEVISE REAL ESTATE UNDER NEW HAMPSHIRE STATUTE**, by will proved in probate court, and the power thus given extends to all lands, tenements, and hereditaments, and all rights thereto and interests therein, whether legal or equitable. *Id.*

11. MARRIED WOMAN MAY, IN EQUITY, property she may be entitled to have separate use, and this is enacted without which no trustee is necessary; but only through the medium of a trust created would be equally at the disposal of the wife.
 12. PROVISION OF STATUTE THAT EVERY man may dispose of his property by will in case of married women. *Id.*
 13. IN NEW HAMPSHIRE MARRIED WOMAN'S PROPERTY HELD IN AUTRE DROIT extinguishes the trust of an executrix.
 14. AT COMMON LAW MARRIED WOMAN: 1. In *autre droit* as executrix; 2. When by an act of parliament, or is transferred personal property held in trust sub nomine.
 15. UNDER A POWER CONTAINED IN A MARRIAGE OR AFTER THE MARRIAGE UPON PERSONAL PROPERTY, WITH HER HUSBAND, CHOOSES IN ACTION, OR PERSONAL PROPERTY IF HE ASSENT. *Id.*
 16. WILL OF MARRIED WOMAN IS INEFFECTIVE where the interests or rights of the husband are concerned, in case of a devise of chattels retained in the possession of the wife or the personal property.
 17. CONSENT OF HUSBAND TO RENDER TESTAMENTARY POWERS the particular will, and not a mere general power.
 18. PREVIOUS ASSENT OF HUSBAND TO WILL OF WIFE: any subsequent dissent is immaterial.
 19. ASSENT OF HUSBAND TO WILL OF WIFE: ACTS. *Id.*
 20. HUSBAND'S ASSENT TO WIFE'S WILL: property belonging to her before marriage is shown to be her own; the marriage he assented that she had a right to it; question, that the will was proved before the husband was present when he signed it; but the articles which belonged to the wife he took them away without objection.
 21. WILL OF MARRIED WOMAN MUST BE PROVED and be proved in the probate court, either by the husband's power or otherwise. *Id.*
 22. PROBATE WILL BE LIMITED TO PROPERTY DEVISED. *Id.*
 23. PROBATE COURT HAS JURISDICTION over the married woman, and its decision is final as to the testamentary capacity of the husband to the will where such a question arises.
- See ACKNOWLEDGMENT

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See PARTITION, 6.

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See TRESPASS, 2.

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See ASSUMPTION, 2; CONTRIBUTION, 2.

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See VENDOR AND VENDEE, 4.

MORTGAGES.

1. **MORTGAGE REMAINS EQUITABLE LIEN UPON LANDS** in favor of an assignee of the bond and mortgage, to whom it was assigned, as collateral security for a loan made by him to the mortgagee, notwithstanding the mortgagee afterwards receives a conveyance of the premises from the mortgagor, and gives him, in consideration thereof, an acquittance of the bond and mortgage. *Brown v. Blydenburyk*, 506.
2. **WHERE MORTGAGOR OF LAND SUCCESSIVELY CONVEYS TWO PORTIONS** of the mortgaged premises to different persons, with a stipulation in the first deed that the grantee will pay the mortgage, the second grantee will have an equitable right to have the mortgage first enforced against the portion first conveyed; of which right the mortgagor can not afterwards deprive him. *Russell v. Pistor*, 509.
3. **CONVEYANCE OF PORTION OF MORTGAGED PREMISES**, by the mortgagor, expressed to be upon condition that the grantee assumes and will pay the mortgage, renders the portion conveyed primarily liable for the entire mortgage debt. *Id.*
4. **PAYMENT OF MORTGAGE EXTINGUISHES IT, AS AGAINST THIRD PERSONS** who, even afterwards, acquire liens upon the property, notwithstanding

any agreement between the parties, designed to keep it alive to secure future advances. *Mead v. York*, 467.

See EXECUTIONS, 15; EXECUTORS AND ADMINISTRATORS, 7; NOTICE; VENDOR AND VENDEE, 4.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 13-15.

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See EXECUTIONS, 1; PLEADING AND PRACTICE, 6.

NEGLIGENCE.

1. WHERE THERE IS NO EVIDENCE OF NEGLIGENCE ON PART OF DEFENDANT, it is error to submit the question of negligence to the jury as a debatable matter. *Railroad Co. v. Skinner*, 654.
2. NO ACTION LIES FOR INJURY OCCURRING IN PROSECUTION OF LAWFUL ACT, where it results from an inevitable or unavoidable accident without any blame or default on the defendant's part. *Miller v. Martin*, 242.
3. ACTION LIES FOR INJURY CAUSED BY WANT OF DUE CAUTION without any regard to the intent with which the injury was done. *Id.*
4. IF DEFENDANT USES DUE DILIGENCE IN FIRING HIS LAND, and notwithstanding, on account of inevitable accident, the fire escapes and burns the plaintiff's rails, the defendant is not liable. *Id.*

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4; BANKS AND BANKING, 7; COMMON CARRIERS; DRUGGIST; NEGOTIABLE INSTRUMENTS, 11; RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. NOTE PAYABLE IN SPECIFIC ARTICLES IS NOT NEGOTIABLE. *Tibbets v. Gerrish*, 307.
2. PROMISSORY NOTE IN FORM, "I PROMISE TO PAY," etc., and signed by two persons, is a joint and several note. *Ladd v. Baker*, 355.
3. PROMISSORY NOTE GIVEN FOR PURCHASE PRICE RESTS UPON SUFFICIENT CONSIDERATION while the purchaser remains in the undisturbed possession of the property sold, although the title to the property is not in the seller at the time, and he has warranted the title to be good in the purchaser, free from all legal claims. *Morrison v. Edgar*, 236.
4. INDORSER OF PROMISSORY NOTE may be considered as the drawer of a bill of exchange upon the maker thereof. *Patterson v. Todd*, 622.
5. INDORSEMENT OF NOTE OVERDUE IS EQUIVALENT TO DRAWING NEW BILL OF EXCHANGE, payable at sight, upon which the indorser is liable only upon proof of a demand upon the maker, and notice of his failure to pay. Such indorsement is not a new note. *Id.*
6. NOTE OVERDUE AND NOTE PAYABLE ON DEMAND are in legal effect the same. *Id.*
7. BY PAROL EVIDENCE, CONTRACT OF INDORSEMENT may be converted into an absolute and unconditional promise to pay, or to mean nothing further than the transfer of the note without recourse. *Id.*
8. HOLDER OF NEGOTIABLE NOTE MAY PROVE BY ORAL TESTIMONY that at the time of the indorsement thereof it was agreed by the maker, indorser, and holder that the indorser should be absolutely bound for the payment of it, without the usual demand and notice. *Barclay v. Weaver*, 661.

9. INDORSEMENT OF NEGOTIABLE PAPER IS NOT REGARDED AS WRITTEN CONTRACT to pay on condition that the usual demand be made and notice given. The most that can be said is, that from it there is implied a contract to pay on condition of the usual demand and notice; but this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally or in writing. The duty of demand and notice, in order to hold an indorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time by the indorser. *Id.*
10. PROVISIONS OF ACT OF APRIL 5, 1849, IN REFERENCE TO NOTICE to parties to promissory notes, do not apply to notes due before the passage of the act. *Id.*
11. ORDINARILY IT IS QUESTION OF FACT WHAT IS REASONABLE TIME within which to present a check for payment, but in cases of great negligence, such as paying a check over a year after it is made payable, without inquiry, the court is justified in instructing the jury that the plaintiff should not recover. *Lancaster Bank v. Woodward*, 618.
12. PAYMENT OF CHECK TO PARTY HOLDING IT one day before it becomes due, and before it has been presented to the bank upon which it was drawn, destroys its negotiability and value forever. *Id.*
13. CHECKS ARE NOT AS HIGH EVIDENCE OF INDEBTEDNESS AS NOTES, but are equally subject to the rule that when taken up or paid after the day in the check specified, they are subject to all intervening considerations which would affect them between the original parties. *Id.*
14. AVERMENT THAT NOTE WAS INDORSED BEFORE SUIT IN DECLARATION thereon is not to be considered in determining that fact, because it is not evidence. *Stevens v. Beale*, 108.
15. TOTAL OR PARTIAL FAILURE OF CONSIDERATION in a note or bond may be given in evidence to defeat or diminish the recovery in an action on those instruments. *Smith v. Busby*, 207.
16. CONTRACT THAT IF PROMISEE WILL PAY NOTE ON WHICH HE IS INDORSER the promisor will pay him a specified sum, followed by payment of the note by the promisee, is a valid contract, and will support an action for the sum promised. *L'Amoreux v. Gould*, 524.
17. UNACCEPTED CHECK OR DRAFT ON BANK IS NO ASSIGNMENT OF DEPOSIT therein to the drawer's credit, gives no lien thereon, and creates no liability from the bank to the holder. *Chapman v. White*, 464.
18. WHERE AUDITOR IS APPOINTED TO STATE ACCOUNT BETWEEN DRAWER OF DRAFT sued on and the corporation whose agent accepted it payable "when in funds," after a certain other draft was paid, his report that the corporation "were in funds" is a statement of a fact within the province of the auditor to make, and is *prima facie* evidence of the fact. *Gould v. Norfolk Lead Co.*, 50.
- See AGENCY, 5; ASSIGNMENT OF CONTRACTS, 4-6, 11; ASSUMPSIT, 2; ATTACHMENTS, 10; BANKS AND BANKING, 4-6; CORPORATIONS, 3; COMPROMISE; EXECUTORS AND ADMINISTRATORS, 21; HUSBAND AND WIFE, 4, 5; INFANCY, 2, 3; JUDGMENTS, 3; VENDOR AND VENDEE, 2; WITNESSES, 1.

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DAMAGES SUCH AS WILL PUNISH DEFENDANT AND COMPEL HIM TO ABATE NUISANCE are bound to be awarded to the plaintiff in a suit for the continuance of the nuisance, after a recovery in a former action, notwithstanding the erection complained of was of great value to the defendant, and the injury to the plaintiff was insignificant. *McCoy v. Danley*, 680.

OFFICES AND OFFICERS.

1. WHERE POWER HAS BEEN GIVEN TO APPOINT TO OFFICE and the same has been exercised, any subsequent appointment to the same office will be void unless the prior incumbent has been removed and the office becomes vacant. *Thomas v. Burrus*, 154.

2. WHERE APPOINTMENT TO OFFICE IS VOID, the acts of the appointee will also be void, and the sureties on his bond will not be deemed liable. *Id.*

2. PUBLIC OFFICERS ARE NOT PERSONALLY LIABLE FOR CONSEQUENTIAL INJURIES arising out of acts done by them under lawful authority and in a proper manner, at least, in acting without private emolument in a matter of public concern.

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4. PUBLIC OFFICER IS NOT PERSONALLY RESPONSIBLE for the necessary and unavoidable destruction of goods stored in buildings, when such buildings were destroyed by him, in the lawful performance of a public duty imposed upon him by a valid and constitutional statute. *Id.*
 See CONTRIBUTION, 2; CORPORATIONS, 7, 15; EXECUTIONS; PROCESSES.

OPINIONS OF WITNESSES.

See EVIDENCE, 11.

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See EXECUTORS AND ADMINISTRATORS, 9, 10, 17, 20; PROBATE COURTS, 4, 5

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See PROBATE COURTS.

OVERDRAFTS.

See BANKS AND BANKING, 5.

PARENT AND CHILD.

HUSBAND IS NOT BOUND TO SUPPORT CHILD OF WIFE BY FORMER MARRIAGE; but if he is appointed guardian of the child, he has no legal claim for the maintenance of the child for the time previous to such appointment. *Barnes v. Ward*, 590.

See DEEDS, 2; EXECUTORS AND ADMINISTRATORS, 6; TRUSTS AND TRUSTEES, 4.

PAROL CONTRACT.

See STATUTE OF FRAUDS, 3.

PAROL EVIDENCE.

See COMMON CARRIERS, 4; CORPORATIONS, 6; EXECUTIONS, 3; NEGOTIABLE INSTRUMENTS, 7, 8; TRUSTS AND TRUSTEES, 1, 3.

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See ATTACHMENTS, 2, 8-10; CONTRACTS, 1; EXECUTORS AND ADMINISTRATORS, 5; JUDGMENTS, 1, 3, 8; MARRIED WOMEN, 23; PLEADING AND PRACTICE, 1, 2.

PARTITION.

1. PARTITION IS RIGHT which a tenant in common may claim from his co-tenant at any time. *Higginbottom v. Short*, 198.
2. WHERE EQUITABLE PARTITION CAN NOT BE MADE, owing to the nature of the property, a court of equity will grant relief by decreeing a sale of the property and dividing its proceeds among the co-tenants. *Id.*
3. CONVEYANCES BETWEEN TENANTS IN COMMON MUST CONTAIN WORDS OF PERPETUITY to pass a fee, as one tenant in common can not convey to another in any other way, or by a conveyance whose operation is different from those used by feoffors between whom no such relationship exists; and if no words of perpetuity are used an estate for life merely passes. *Rector v. Waugh*, 251.
4. ON CONVEYANCE BETWEEN CO-TENANTS WITH WARRANTY, the warranty continues during the life of the grantee only if the deed contained no word of perpetuity; and if the title of the co-tenants proves to be bad,

and subsequent to the conveyance the co-tenants making it obtain title to the land, this title will not, by virtue of the warranty, inure to the benefit of the grantee's heirs. *Id.*

5. COMMON LAW IMPLIED NO WARRANTY WHEN PARTITION WAS MADE between joint tenants and tenants in common. *Id.*

6. HILLS CONTAINING IRON ORE WERE HELD IN COMMON by two persons and the minor heirs of another former owner; a right to take ore therefrom for one furnace, existing in another person, his heirs and assigns. These owners were at the same time tenants in common of certain forges and furnaces, to which the ore hills were appurtenant, from which ore was obtained for the manufacture of iron at the forges and furnaces. In 1786 the two owners and the guardians of the minor heirs of the other entered into a written agreement that amicable actions for partition of said furnaces, forges, and ore hills be entered, and appointing certain persons to make the partition. The persons appointed to make partition reported that the agreement could not be carried out without great injustice. Afterwards, in 1787, the same parties entered into another agreement in writing, in which they designated certain persons to make partition of the forges and furnaces, and other real estate held by them in common; but providing that the ore hills "shall remain together and undivided as a tenancy in common," one of the parties to be entitled to three sixth parts thereof, another to one sixth, and the said minors to the remaining two sixth parts thereof; and declaring that neither of the parties, their agents or workmen, should interfere with or interrupt either of the other parties at any mine-hole by them opened and occupied for the purpose of raising iron ore. The entry of amicable actions of partition to carry out the agreement was provided for, and they were entered. The persons appointed made report allotting the furnaces and forges, and reporting that a certain tract of land and said ore hills do still remain undivided, to be held by the parties as tenants in common, according to their respective shares and the covenants and articles of said agreements. The court, in 1787, confirmed this report, and the parties entered on the purparts respectively assigned to them, and they and those claiming under them have since held the same; the right reserved to ore for one furnace being also exercised at the time of the institution of this action. An action of partition to divide the ore hills was brought in 1851, and the court held: 1. That the partition thus made in 1787, by the agreement of the parties in interest, with the sanction of the court having jurisdiction, is binding on the successors in the title, not only because of the judgment of a court in partition under which they claim, but because the covenants in the agreement of 1787 were real and ran with the land, though the words "heirs and assigns" were not used. 2. That the agreement of 1787, and the judicial proceedings had pursuant to it, constitute an insuperable bar to this action. 3. The keeping of the mine hills in common was the consideration for submitting to the partition of the rest of the estate, and the partition of the mine hills in this action would destroy the foundation on which the former partition rests, and this can not be permitted without a redivision of the whole of the estate. 4. While the laws of Pennsylvania now provide for the partition of any mineral lands held in common, whatever the peculiarities of their structure, neither the letter nor the spirit of those laws demands the partition

of an estate in circumstances such as attend these hills of ore. *Coleman v. Coleman*, 641.

See EASEMENTS, 1; HUSBAND AND WIFE, 6; MARRIED WOMEN, 1, 2; WILLS, 4.

PARTNERSHIP.

1. WHERE QUESTION BEFORE JURY IS WHETHER B. IS LIABLE AS PARTNER on a note signed by B. & Co., evidence that A.'s credit was bad until he commenced business under the firm name of A. & Co. is entirely irrelevant. *Dutton v. Woodman*, 48.
2. EVIDENCE ADMISSIBLE ONLY ON ASSUMPTION OF EXISTENCE OF COPARTNERSHIP is clearly incompetent when offered for the purpose of proving the existence of the partnership. *Id.*
3. ATTORNEY'S ENTRY OF HIS GENERAL APPEARANCE FOR DEFENDANT, in an action against a partnership, is to be construed as an appearance for the partners as partners, and not as an appearance for the partners individually, severally, and personally, so as to make a judgment against the partnership in that action binding on an individual partner in another jurisdiction, by whom the appearance was not authorized. *Phelps v. Brewer*, 58.
4. IN SUIT AGAINST PARTNERSHIP, PARTNER NOT SERVED with process, and not within the jurisdiction of the court, is not bound by the judgment, even though the statute of the state where it is rendered provides that service upon the partner within the state shall be sufficient. The statute of a state can not give its courts jurisdiction over persons not within its limits nor subject to its laws. *Id.*
5. PARTNER HAS NO IMPLIED POWER TO ENTER APPEARANCE in a suit, except for the partnership. *Id.*
6. PARTNER HAS NO AUTHORITY TO CONFESS JUDGMENT FOR HIS COPARTNER, either before or after dissolution; and where judgment is so confessed after dissolution by one partner, it will be set aside as against the co-partner, and an execution against him will be quashed. *Morgan v. Richardson*, 235.
7. BONA FIDE SALE OF ALL PARTNERSHIP EFFECTS MADE BY ONE PARTNER to another, at the dissolution of the partnership, is valid, and the property so sold becomes the separate estate of the purchaser, although the firm and both partners are at the time insolvent. *Howe v. Lawrence*, 68.
8. SEPARATE ESTATE OF PARTNERS MUST BE FIRST DISTRIBUTED TO SEPARATE CREDITORS, under the Massachusetts statute, although there may be no solvent partner and no joint estate to which the joint creditors can resort. *Id.*
9. SURVIVING PARTNER IS NOT ENTITLED TO COMPENSATION FOR WINDING UP the partnership business. *Beatty v. Wray*, 677.
10. SURVIVING PARTNER CAN NOT SET OFF PRIVATE DEBT DUE HIM BY DECEASED COPARTNER against his share of assets collected since the dissolution of the copartnership; the effect of such set-off would be to give a preference among creditors of equal degree, which is in opposition to the South Carolina act of 1789. *Moffatt v. Thomson*, 737.
11. PARTNER'S SHARE OF PARTNERSHIP STOCK AND EFFECTS IS ASSETS, AND GOES TO HIS REPRESENTATIVES, subject to the partnership debts, upon his decease; but the surviving partner is authorized to take and hold as survivor for the purpose of administration, until the effects are reduced

to money and the debts are paid; after which he is bound to pay over to the legal representatives of the deceased the latter's just share of the partnership funds. *Id.*

12. PARTNER'S LIEN IS LIMITED TO ADVANCES FOR PARTNERSHIP PURPOSES, and does not exist for a private debt due by a copartner. *Id.*

See EVIDENCE, 2, 3; EXECUTIONS, 7; INSURANCE—LIFE, 1; JUDGMENTS, 3; PLEADING AND PRACTICE, 1, 2.

PART PERFORMANCE.

See STATUTE OF FRAUDS, 3.

PATENTS.

See EVIDENCE, 6; INVENTIONS; MARRIED WOMEN, 5; PUBLIC LANDS, 3-5; STATUTE OF LIMITATIONS, 3.

PAYMENT.

See ATTACHMENTS, 6, 7; CORPORATIONS, 3, 4, 12; COVENANTS, 11; EXECUTIONS, 18; EXECUTORS AND ADMINISTRATORS, 22, 23; MORTGAGES, 4; NEGOTIABLE INSTRUMENTS, 12.

PENALTIES.

See BONDS.

PERFORMANCE.

See ASSIGNMENT OF CONTRACTS, 1; BONDS; CONTRACTS, 4, 5.

PERPETUITY.

See PARTITION, 3.

PETITION.

See EXECUTORS AND ADMINISTRATORS, 10.

PLEADING AND PRACTICE.

1. PLEA IN ABATEMENT IS PROPER MODE TO TAKE ADVANTAGE OF NON-JOINDER OF PARTNER, but is too late after the general issue pleaded, in trespass by one of two partners against a sheriff for a seizure and sale of goods under an execution against the other partner alone, the declaration alleging that the goods were the goods of the plaintiff. *Deal v. Bogue*, 702.
2. PLAINTIFF IN EXECUTION MAY BE JOINED WITH SHERIFF AND HIS DEPUTY, in an action of trespass for seizing and selling partnership property on execution against one of two partners, where such plaintiff was present at the sale and purchased a portion of the property. *Id.*
3. COMPLAINT WHICH ALLEGES THAT DEFENDANT IS INDEBTED TO PLAINTIFF in a specified sum, for goods sold and delivered by plaintiff to defendant at his request, at, etc., and that there is now due to plaintiff from defendant a sum specified, for which he demands judgment, is sufficient under the New York code of procedure. *Allen v. Patterson*, 542.
4. IT WAS NECESSARY TO MAKE A PROOF OF A WRITING DECLARED UPON AT COMMON LAW; to set out its date and the parties to it. Its loss or destruction necessarily destroyed any claim under it, but at present an excuse for its non-production may be made. *French v. Martin*, 294.

6. DECLARATION, SUFFICIENCY OF.—In declaring upon an easement, the plaintiff may either allege a certain deed from one party to another, or generally that a deed supposed to have been lost had been made, without naming the parties or date. Where twenty years' user is relied upon to prove said last-mentioned deed, such declaration is sufficient. Either form is good upon demurrer. *Id.*
6. DEFENDANT SUED BY WRONG CHRISTIAN NAME must plead the misnomer in abatement, or it is waived. *Trull v. Howland*, 82.
7. DEFENSE NOT SET UP IN ANSWER IS OF NO AVAIL. *Field v. Mayor*, 435.
8. DEFAULT ADMITS CAUSE OF ACTION AND MATERIAL AND TRAVERSABLE AVERMENTS, but not the amount of damages. *Wilson v. Wilson*, 320.
9. WHENEVER INTENTION IS NECESSARY OR MATERIAL IT IS ISSUABLE like any other fact. *French v. Martin*, 294.
10. MERE CLERICAL MISTAKE of a single figure the court will permit to be corrected instanter upon suggestion, unless the opposite party has been misled by it. *Howell v. Ashmore*, 371.
11. COURT MAY COMPEL MONEY RAISED UPON ITS OWN PROCESS TO BE BROUGHT INTO COURT to direct its disposition, but can exercise no such power over the process of another court. *Woodruff v. Chapin*, 416.
12. WHERE ACTION FOUNDED UPON TORT, such as assault and battery, false imprisonment, trover, and the like, is brought against several defendants, and a verdict is awarded for the plaintiff, the latter may, after verdict, enter a *nolle prosequi* as to some of them, and take his judgment against the rest. *Hardy v. Thomas*, 152.
13. IN ABSENCE OF PRAYER FOR SPECIFIC INSTRUCTION, the silence of the judge is no error. *Holliday v. Rheem*, 628.
14. IT IS NO ERROR TO REFUSE INSTRUCTION ASKING COURT TO COMMENT UPON FACTS in proof, or to direct the minds of the jury to such facts. *State v. Homes*, 269.
15. PARTY CAN NOT COMPLAIN BECAUSE COURT DID NOT GIVE INSTRUCTIONS NOT ASKED, where, if he had sought and obtained them, they must be unfavorable to him. *Deal v. Bogue*, 702.
16. IF THERE IS NO EVIDENCE OFFERED UPON POINT ARISING ON TRIAL of a cause which it is important to either party to sustain, it is not only no error in the judge to inform the jury that there is no evidence upon the point, but it is his duty to do so. *Satterwhite v. Hicks*, 577.
17. APPEALS MUST GENERALLY DEPEND ON QUESTIONS SUBMITTED TO COURT BELOW, and no new ground can be taken in the appellate court; but this is a rule for the parties and counsel, and the appellate court may, in order to do justice, assume any new ground having an important bearing on the merits, if full opportunity for explanation and argument is given. *Elliott v. Rhett*, 750.

See ASSIGNMENT OF CONTRACTS, 5-7, 11; ASSUMPSIT; ATTACHMENTS, 2, 5, 6, 8, 14; AUCTIONS; BANKS AND BANKING, 1, 6; COMMON CARRIERS, 11; CONTRACTS, 4; CORPORATIONS, 3; COVENANTS, 11; CRIMINAL LAW, 3; DECEIT; EASEMENTS, 11, 12; EJECTMENT; EQUITY; EVIDENCE, 1; EXECUTIONS, 14, 16; EXECUTORS AND ADMINISTRATORS, 5, 7-9; FRAUD, 1, 2; FRAUDULENT CONVEYANCES, 4; HUSBAND AND WIFE, 7; INFANCY, 1, 7; INJUNCTIONS; INVENTIONS, 5; JUDGMENTS; JURY AND JURORS;

LIEL, 2; NEGLIGENCE, 1; NEGOTIABLE INSTRUMENTS, 11, 14; RAILROADS, 2, 4; RECEIVERS, 1; TRESPASS, 2-4; TRUSTS AND TRUSTEES, 1; WITNESSES, 3, 4.

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See PLEADING AND PRACTICE, 1; TRESPASS, 2.

POLICIES.

See INSURANCE.

POSSESSION.

SEIZIN AND POSSESSION DO NOT MEAN SAME THING; seisin is the possession of a freehold estate, created at common law by livery of seisin. *Ferguson v. Witsell*, 744.

See ADVERSE POSSESSION; CORPORATIONS, 3; CRIMINAL LAW, 5; EASEMENTS, 16; ESTOPPEL, 2; EVIDENCE, 6; EXECUTIONS, 17; EXECUTORS AND ADMINISTRATORS, 3; FACTORS, 2; FRAUDULENT CONVEYANCES, 3; HUSBAND AND WIFE, 2; LANDLORD AND TENANT, 7; MARRIED WOMEN, 5; NEGOTIABLE INSTRUMENTS, 3; PUBLIC LANDS, 2; RAILROADS, 6; STATUTE OF FRAUDS, 3; STATUTE OF LIMITATIONS, 3; VENDOR AND VENDEE, 1, 2.

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See CORPORATIONS, 1, 2, 7, 9.

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PRACTICE.

See PLEADING AND PRACTICE.

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See MARRIED WOMEN, 4, 5.

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See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; PARTNERSHIP, 10.

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See ADVERSE POSSESSION; EASEMENTS, 5; WATERCOURSES, 5.

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See ADVERSE POSSESSION, 2; ATTACHMENTS, 16; BOUNDARIES; COMMON CARRIERS, 5; CORPORATIONS, 3; EXECUTIONS, 6, 17; TRUSTS AND TRUSTEES, 5; WATERCOURSES, 12; WILLS, 2, 3.

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See WILLS, 6.

PRINCIPAL AND AGENT.

See AGENCY.

PRIVIES.

See MARRIED WOMEN, 23.

PROBATE.

See EXECUTORS AND ADMINISTRATORS, 7; MARRIED WOMEN, 22; WILLS, 1, 2.

PROBATE COURTS.

1. DECISIONS OF PROBATE JUDGE, REGULARLY MADE, OF MATTERS WITHIN HIS JURISDICTION, are conclusive, unless an appeal is interposed. *Merrill v. Harris*, 359.
2. PROCEEDINGS OF PROBATE COURT MUST BE REGULAR, AND UPON MATTERS WITHIN ITS JURISDICTION, or they will not be conclusive. *Id.*
3. WHEN STATUTE GIVES JURISDICTION OF ANY SUBJECT TO ORPHANS' COURT, it impliedly prohibits the other courts from taking cognizance of it. And therefore the jurisdiction which the act of 1833 has given to the orphans' court over the subject of advancements is exclusive. *Holliday v. Ward*, 671.
4. SALE BY ORDER OF ORPHANS' COURT IS JUDICIAL SALE. The doctrine of *caveat emptor* applies to such sales. *Sackett v. Twining*, 599.
5. DECREE OF ORPHANS' COURT, approving a sale of property made by its order, will not be inquired into collaterally. *Id.*

See EXECUTORS AND ADMINISTRATORS, 9, 10, 17, 20; MARRIED WOMEN, 21-23; WILLS.

PROCESS.

1. MAXIM THAT "EVERY MAN'S HOUSE IS HIS CASTLE" applies to arrests in civil but not in criminal actions. *Barnard v. Barilett*, 123.
2. OFFICER WITH CRIMINAL PROCESS MAY BREAK AND ENTER DEFENDANT'S HOUSE and search for him, to make an arrest, though the defendant is not there, if such officer acts *bona fide* under a belief that the party is there, and after due notice, and does no unnecessary damage. *Id.*
3. WRIT REGULAR ON ITS FACE EMANATING FROM COURT OF SUPERIOR JURISDICTION is a justification to the officer acting under it. *Coleman v. McAnulty*, 229.

See JUDGMENTS, 5, 6; PARTNERSHIP, 4.

PROFERT.

See PLEADING AND PRACTICE, 4.

PROMISSORY NOTES.

See AGENCY, 5; ASSIGNMENT OF CONTRACTS, 11; ATTACHMENTS, 10; BANKS AND BANKING, 6; COMPROMISE; EXECUTORS AND ADMINISTRATORS, 21; HUSBAND AND WIFE, 4, 5; INFANCY, 2, 3; JUDGMENTS, 3; NEGOTIABLE INSTRUMENTS; VENDOR AND VENDEE, 2; WITNESSES, 1.

PROTEST.

See EVIDENCE, 8.

PUBLIC LANDS.

1. PURCHASER OF PUBLIC LANDS OF UNITED STATES who has complied with the necessary preliminaries of purchase is, upon payment of the purchase

money, vested with title to the land, unless it is established by proof that the claimant who disputes such title was a *bona fide* purchaser without prior notice of purchase by the party in whom the title is vested. *Nelson v. Sime*, 144.

2. WHERE PRIOR VENDEE IS IN POSSESSION OF TRACT OF PUBLIC LANDS, and informs a party about to purchase the same that he is the owner, such information will be construed to be proper notice to the intending purchaser of the rights of such possessor. *Id.*
3. ONE OBTAINING PATENT TO LAND BY FRAUD towards another, or who affects himself with a trust, holds the title thus acquired for the benefit of those who have been injured by his conduct. *Groves' Heirs v. Fulsome*, 247.
4. PURCHASER OF LAND UNDER PATENT IS BOUND TO TAKE NOTICE of the chain of conveyances which authorizes the commonwealth to grant her remaining title to the patentee. *Gingrich v. Foltz*, 631.
5. EVIDENCE OF AGENCY.—Evidence that a person is in poor circumstances, a clerk in the land office, and that he is credited with thirty-two thousand dollars upon the books of that office in the same manner as he is with the purchase price of defendant's land, is admissible as tending to prove that he paid said purchase price as agent for defendant. *Strimpfler v. Roberts*, 606.

See MARRIED WOMEN, 4, 5; STATUTE OF LIMITATIONS, 3; TRUSTS AND TRUSTEES, 3.

PUBLIC OFFICERS.

See OFFICES AND OFFICERS, 3, 4.

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See HIGHWAYS.

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See BANKS AND BANKING, 1; FRAUD, 1; NEGLIGENCE, 1; NEGOTIABLE INSTRUMENTS, 11; RAILROADS, 4.

QUIA EMPTORES.

See DEEDS, 10, 11.

QUIET ENJOYMENT.

See COVENANTS, 5, 6.

RAILROADS.

1. RAILROAD COMPANY MAY REMOVE ORNAMENTAL OR OTHER TREES within the limits of the land taken under their charter for a roadway to fit their track for safe and convenient use, either when originally constructing the road or afterwards. *Brainard v. Clapp*, 74.

2. RAILROAD COMPANY ARE JUDGES OF NECESSITY OF CUTTING TREES inside their right of way, and may authorize it to be done by any officer or agent, and the burden of proof to justify it does not rest upon them. *Id.*
3. LESSEE OF RAILROAD IS LIABLE FOR INJURY BY NEGLECT TO KEEP AND RING BELL upon a locomotive, as required by the Massachusetts statute, whereby a collision with a vehicle crossing the track is caused. *Linsfield v. Old Colony R. R. Co.*, 124.
4. RAILROAD COMPANY NEGLECTING REASONABLE PRECAUTIONS BESIDES RINGING BELL, as required by statute, to avoid collision with a vehicle at a turnpike crossing, is liable for an injury arising from such neglect, and it is for the jury to judge as to whether or not such additional precautions have been neglected. *Id.*
5. RAILROAD COMPANY IS NOT LIABLE TO OWNER OF CATTLE who suffers them to go upon the track where they are killed, unless the damage done is gratuitous. *Railroad Co. v. Skinner*, 654.
6. RAILROAD COMPANY IS PURCHASER, IN CONSIDERATION OF PUBLIC ACCOMMODATION and convenience, of the exclusive possession of the ground paid for by it, and of a license to use the greatest attainable rate of speed, with which neither the person nor the property of another may interfere. *Id.*
7. RAILROAD COMPANY IS NOT BOUND TO FENCE ITS ROAD, in Pennsylvania. *Id.*
8. WHETHER OWNER OF ANIMAL KILLED ON RAILROAD KNEW OF ITS DANGER or not, is not a material inquiry in an action against the company for its loss. *Id.*

RAPE.

See CRIMINAL LAW, 3.

RATIFICATION.

See INFANCY.

RECEIPTS.

See ACCORD AND SATISFACTION; EXECUTIONS, 18; MARRIED WOMEN, 1.

RECEIVERS.

1. PURCHASE OF LAND AT RECEIVER'S SALE is not rendered void by the facts that the purchaser was an attorney prosecuting the suit in which the receiver was appointed, and that the sale was for an inadequate price, influenced by erroneous (not fraudulent) representations by such attorney; objections of this kind must be raised by motion to set aside the sale. *Chautauque Co. Bank v. White*, 442.
2. PARTICULAR DESCRIPTION OF LAND IN ASSIGNMENT TO RECEIVER pursuant to an order of court in a creditor's suit to set aside a fraudulent conveyance is unnecessary, but a description in general terms of all the debtor's personal and real property is sufficient. *Id.*

See FRAUDULENT CONVEYANCES, 7; JUDGMENTS, 2.

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See EVIDENCE, 6.

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RECORDS.

See DEEDS, 3-5; FRAUDULENT CONVEYANCES, 6; INSURANCE—FIRE, 4.
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REGISTER.

See WILLS, 1-4.

RELATION.

DOCTRINE OF RELATION HAS NEVER BEEN EXTENDED by courts further than to hold that a legal title when acquired shall relate back to the period when the right accrued to the property, so as to defeat subsequent claimants or incumbrancers holding adversely to the right. *Lauricella v. Corquette*, 200.

RELEASE.

1. CONSIDERATION OR RELEASE UNDER SEAL CAN NOT BE DENIED AT LAW.
Barnes v. Ward, 590.
2. EQUITY WILL LOOK INTO CONSIDERATION OR RELEASE UNDER SEAL, and if it was obtained by fraud or imposition, or by taking undue advantage of the situation of the party executing it, will either set it aside altogether or restrain the party holding it from making use of it at law. *Id.*
See GUARDIAN AND WARD, 3; INJUNCTIONS, 2.

REMAINDERS.

See EXECUTORS AND ADMINISTRATORS, 2, 3.

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See COVENANTS, 1.

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See COVENANTS, 5, 6.

RIPARIAN PROPRIETORS.

See WATERCOURSES.

RIVERS.

See WATERCOURSES.

SALES.

1. **PARTY TO WHOM CREDIT IS ORIGINALLY GIVEN** by the vendor is liable for the payment to him of the amount credited. *Wallace v. Wortham*, 197.

2. **CONTRACT BY WHICH MERCHANT AGREES TO DELIVER TO MILLER WHEAT TO BE GROUND**, and the miller agrees to return a specified proportion of flour for such wheat, is a bailment, not a sale, and the wheat, and also the flour when ground, are the property of the merchant. *Foster v. Pettibone*, 530.

3. **WHERE GOODS ARE SOLD ON INSPECTION, THERE IS NO STANDARD BUT IDENTITY**, and no warranty implied other than that the identical goods sold, and no others, shall be delivered. The name given to them in the bill of parcels is then immaterial, for faith was placed, not in the name, but in the quality and kind discovered on the inspection; but if there be fraudulent concealment or misrepresentation, the case is different. *Carson v. Baillie*, 659.

See AUCTIONS; ESTOPPEL, 3, 4; EVIDENCE, 3, 11-13; EXECUTORS AND ADMINISTRATORS; FACTORS; FRAUDULENT CONVEYANCES; PARTITION, 2; PLEADING AND PRACTICE, 3; PROBATE COURTS, 4, 5; RECEIVERS, 1; STATUTES OF FRAUDS, 2, 3; TRESPASS, 1; VENDOR AND VENDEE.

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See FUGITIVES FROM JUSTICE; WATERCOURSES, 15.

SPECIAL DAMAGES.

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SPECIFIC PERFORMANCE.

Where damages for specific performance or contract for sale of land is sought, the contract must be proved. *Roskin v. Simpson, 622.*

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STATUTE OF FRAUDS.

1. **FRAUDS AND TRUSTS ARE NOT WITHIN STATUTE OF FRAUDS.** *Groves' Heirs v. Fulsome*, 247.
2. **WHERE LIABILITY OF PERSON FOR WHOSE USE GOOSE FRAUDULENT EXIST,** any promise by a third person to pay for the same must be in writing; but where this liability does not exist, the promise to pay need not be in writing. *Wallace v. Wortham*, 197.
3. **POSSESSION CONSIDERED AS EVIDENCE OF PAROL CONTRACT** for the sale of land, and as part performance to take it out of the statute of frauds, must not only be delivered and taken, but must be maintained, in pursuance of such contract. And if a purchaser by parol takes possession under his contract, and afterwards attorney to the vendor as landlord, or fixes upon himself any other character than that with which he entered, he lets go his equities, and his possession is referred to his new agreement. *Randall v. Simpson*, 638.

STATUTE OF LIMITATIONS.

1. **COURTS OF EQUITY DISCONTINUE STALE DEMANDS.** *Stringfellow v. Roberts*, 632.
2. **COURTS OF EQUITY, THOUGH NOT BOUND BY STATUTES OF LIMITATIONS,** close their doors against stale demands as sternly as the courts of law. *Id.*
3. **WHERE WARRANT IS ISSUED TO ONE PERSON, AND PURCHASE MONEY IS PAID BY ANOTHER,** and the patent is afterwards taken out by the nominal warrantee, the right of him who paid the purchase money is gone, unless he takes possession of the land, or brings ejectment to recover it within twenty-one years from the date of the warrant, and after that lapse of time he can not recover, no matter how clearly he may be able to prove that the legal owner was in the beginning a trustee for him. *Id.*

See Adverse Possession; Inventory, 8; Watercourses, 5.

STATUTE OF USES.

See Trusts and Trustees, 8.

STATUTES.

1. **CONSIDERATIONS OF POLICY IN CONSTRUCTION OF STATUTES** are entitled to weight only in cases of doubtful interpretation, and where the intention of the legislature appears to be opposed to the literal import of the language of the act. *Coulter v. Robertson*, 168.
2. **CONSTRUCTION OF STATUTES OF STATE BY ITS COURTS SHOULD BE ADOPTED** by the courts of other states. *Per Carpenter, J. American Print Works v. Lawrence*, 420.
3. **DIFFERENT SECTIONS OF SAME ACT MUST, IF POSSIBLE, BE SO CONSTRUED** as to be consistent with each other. *Merrill v. Harris*, 359.

See CORPORATIONS, 11; DEEDS, 4, 5, 10-12; DOWER, 1, 2; EQUITY, 11; EXECUTIONS, 9; EXECUTORS AND ADMINISTRATORS, 9, 18; JUDGMENTS, 1; MARRIED WOMEN, 10-12; NEGOTIABLE INSTRUMENTS, 10; PARTNERSHIP, 4; PROBATE COURTS; SUNDAYS.

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See WATERCOURSES, 15.

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See CORPORATIONS, 13, 14; HIGHWAYS.

SUNDAYS.

CONTRACT MADE ON SUNDAY IS VOID, when a statute forbids it to be made on that day, though it be otherwise lawful. *Woodman v. Hubbard*, 310.

See BAILMENTS, 2.

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See ATTACHMENTS, 10; EXECUTORS AND ADMINISTRATORS, 12; OFFICES AND OFFICERS; WITNESSES, 2.

SURVIVORSHIP.

See HUSBAND AND WIFE, 3; MARRIED WOMEN, 6, 7; PARTNERSHIP, 9-11.

TAXATION.

PROPERTY OF CORPORATION IS EXEMPT FROM TAXATION, only in so far as it is necessary, and not merely convenient for the company to acquire and hold for the purposes for which it was incorporated, under a charter which, after making provision for the payment of certain duties, enacts "that no other tax or impost shall be levied or assessed upon the said company." *State v. Commissioners*, 409.

See EVIDENCE, 5.

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See LANDLORD AND TENANT.

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L. ONE PURCHASING AT WRECK
TRESPASS in hauling the goods, COMMISSIONER'S SALE IS NOT GUILTY OR
could not be taken off in any other way.
Zettsell v. Brown, 563.

2. **MOLLITER MANUS IMPONERE** in a plea is no justification of a beating and wounding. *French v. Martin*, 294.
 3. **PROOF, IN TRESPASS TO TRY TITLE, OF CLAIM OF TITLE FROM COMMON SOURCE** by both parties is sufficient to enable the plaintiff to avoid a nonsuit, as where it is shown that both claim under execution sales against the same party. *Martin v. Ranlett*, 770.
 4. **DEFENDANT SUPPLYING PROOF OF COMMON ORIGIN OF TITLE** claimed by both parties, if the plaintiff fails to do so, will prevent a nonsuit in the appellate court in trespass to try title, although a nonsuit was erroneously refused in the first instance in the court below. *Id.*
 5. **PRIVATE PROPERTY MAY BE DESTROYED BY INDIVIDUAL**, in the exercise of the common-law right of necessity, to prevent the spreading of a conflagration, although his own property is not in imminent danger. *American Print Works v. Lawrence*, 420.
 6. **APPROPRIATION OF ANOTHER'S PROPERTY TO ONE'S OWN USE IS NOT ALLOWED** even for a temporary purpose. *McCoy v. Danley*, 680.
- See CONTRIBUTION, 2; ESTOPPEL, 7; EXECUTIONS, 1, 16, 18; PLEADING AND PRACTICE, 1, 2.**

TRESPASS TO TRY TITLE.

See ESTOPPEL, 7; EXECUTIONS, 16; TRESPASS, 3, 4.

TROVER.

1. **CONVERSION CONSISTS IN ILLEGAL CONTROL OF THING CONVERTED**, inconsistent with owner's right of property. *Woodman v. Hubbard*, 310.
2. **IT IS CONVERSION IF ONE HIRE HORSE TO BE DRIVEN TO ONE PLACE and voluntarily drive him to another, and trover will lie.** *Id.*
3. **PLAINTIFF CAN NOT RECOVER IN TROVER, ALTHOUGH THERE HAS BEEN TECHNICAL CONVERSION**, if his real and substantial claim is merely to recover damages for the breach of an illegal contract. *Id.*

See BAILMENTS; COMMON CARRIERS, 6; CO-TENANCY, 1; ESTOPPEL, 2; EXECUTORS AND ADMINISTRATORS, 22; PLEADING AND PRACTICE, 12.

TRUSTEE PROCESS.

See ATTACHMENTS, 8-10.

TRUSTS AND TRUSTEES.

1. **PARTY WHO UNDERTAKES TO ESTABLISH RESULTING TRUST BY PAROL**, takes the burden of proof on himself. He claims an estate in land, not only without a deed, but in opposition to the written title; ordinarily such trusts should not be favored. *Strimpfer v. Roberts*, 603.
2. **RESULTING TRUST ARISES IN FAVOR** of one who pays the purchase price of land, against the party in whose name the conveyance is made. This rule extends to purchasers from the commonwealth. *Id.*
3. **RESULTING TRUST MAY BE ESTABLISHED OR CONTRADICTED** by parol evidence, even in direct contradiction of a deed, patent, or warrant. *Id.*
4. **WHERE A. PURCHASES LAND WITH B.'S MONEY**, and takes the title in his own name, generally a trust results in favor of B.; but if A. be the father of B., such purchase is generally regarded as an irrevocable advancement to the latter. *Lisloff v. Hart*, 203.

5. IN ALL CASES WHERE IT IS DOUBTFUL WHAT ESTATES TRUSTEES HAVE, they are presumed to take an estate large enough to enable them to accomplish the purposes of the trust; but the trustee will never by construction be held to take a greater estate than the nature of the trust demands. *Coulter v. Robertson*, 168.
6. TRUST ESTATE, GIVEN FOR SPECIFIC PURPOSE, CONTINUES AT LAW for so long a period only as is necessary to effect the purposes of the trust. *Id.*
7. CIRCUIT COURT HAS AMPLE JURISDICTION TO SETTLE ACCOUNT OF TRUSTEE appointed on a judgment of forfeiture against a bank. *Id.*
8. IMPLIED TRUST IS NOT WITHIN STATUTE OF USES, and consequently does not become executed by force of that statute. Such a trust can only be executed by a voluntary conveyance of the trustees, a decree in chancery, or a judgment in ejectment. *Strimpfier v. Roberts*, 606.

See ATTACHMENTS, 8-10; BANKS AND BANKING, 1-3; CORPORATIONS, 9, 12; HUSBAND AND WIFE, 2; MARRIED WOMEN, 5, 9, 11, 13, 14; PUBLIC LANDS, 3; STATUTE OF FRAUDS, 1; STATUTE OF LIMITATIONS, 2.

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See DEEDS, 3-5; EQUITY, 10.

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See EASEMENTS, 5.

USES.

See TRUSTS AND TRUSTEES, 8.

VENDOR AND VENDEE.

1. VINDEE INTENDING TO RESCIND HIS CONTRACT SHOULD RELINQUISH CLAIM to the vendor and abandon possession. *Smith v. Busby*, 207.
2. PURCHASER HOLDING UNDISTURBED AND UNDISPUTED POSSESSION of property under a sale can not, in an action on a promissory note given for the price, set up as a defense that the title to the property was not in the seller at the time of the sale. In such a case there is not properly a failure of consideration so as to allow the consideration to be impeached under the fourteenth section of article five of the statute, regulating the proceedings in justices' courts, which allows the maker of a promissory note to impeach its consideration and show a total or partial failure of the consideration. *Morrison v. Edgar*, 236.
3. SALE OF LAND IN BULK IS NOT DEFEATED BY DEFICIENCY in quantity. *Faure v. Martin*, 515.
4. CONTRACT FOR SALE OF SPECIFIED FARM added to the designation of it the words "containing ninety-six acres, be the same more or less." The agreed price was sixty dollars per acre. The vendor gave a deed, stating the number of acres in the same way, which the purchaser accepted, he giving a mortgage for the same price, computed for ninety-six acres at sixty dollars per acre. In an action between the original parties to foreclose this mortgage, the purchaser proved that the quantity was overstated in the deed and mortgagor proved that by survey the farm contained less than ninety-six acres. *Smith v. Busby*, 207.

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trained only eighty-six acres. Held, that the deficiency was no ground for reducing the sum recoverable on the mortgage. *Id.*

See COVENANTS, 1; NEGOTIABLE INSTRUMENTS, 3; PUBLIC LANDS, 2; STATUTE OF FRAUDS, 3; SPECIFIC PERFORMANCE.

VERDICT.

See JURY AND JURORS; PLEADING AND PRACTICE, 12.

VESSELS.

See EVIDENCE, 7, 8.

VOLUNTARY CONVEYANCES.

See FRAUDULENT CONVEYANCES, 1; TRUSTS AND TRUSTEES, 8.

WAGERS.

See GAMING.

WAIVER.

See INSURANCE—FIRE, 3; MARRIED WOMEN, 1; NEGOTIABLE INSTRUMENTS, 9; PLEADING AND PRACTICE, 6.

WARDS.

See GUARDIAN AND WARD.

WARRANTS.

See STATUTE OF LIMITATIONS, 2.

WARRANTY.

See COVENANTS; EVIDENCE, 12, 13; NEGOTIABLE INSTRUMENTS, 3; PARTITION, 4, 5; SALES, 3.

WASTE.

Waste is defined to be spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that has the remainder or reversion in fee simple; whatever is done which tends to the destruction of the inheritance or the impairing of its value is waste. *Smith v. Sharpe*, 574.

See CO-TEXANCY, 2-4.

WATERCOURSES.

1. **RIPARIAN OWNER ON ONE BANK OF RIVER IS ENTITLED TO FLOW OF WATER** past his land unobstructed, and undiverted and without material diminution, and may build a dam to the center of the stream. *Oleay v. Fennec*, 711.
2. **RIPARIAN OWNER ON ONE BANK IS ENTITLED TO ONLY HALF THE WATER** in the stream, as against an owner on the other bank. *Id.*
3. **RIPARIAN OWNER DIVERTING STREAM IS LIABLE, NOTWITHSTANDING OBSTRUCTION BY INTERVENING OWNER**, for the injury thereby occasioned to a lower proprietor, if the removal of the intervening obstruction would not restore the accustomed flow of the stream. *Id.*
4. **RIPARIAN OWNER WHO IS ENTITLED ONLY TO WASTE-WATER PRIVILEGE** from a mill above him can not complain of a diversion by an owner far-

ther up the stream, so long as his waste-water privilege is not impaired, and the fact that his right is thus limited may be shown in defense to an action for the diversion. *Id.*

6. TWENTY YEARS' OPEN AND CONTINUOUS USE OF WATER of a stream by a riparian owner gives a prior right against a lower owner, even though the latter has no need of the water during that time, and the lower owner has only a waste-water privilege. *Id.*
6. PART OWNER OF MILL CONVEYING TO CO-OWNER IS ESTOPPED TO COMPLAIN OF DIVERSION of water to such mill existing at the time, in an action against subsequent owners, where he conveys his moiety "with all the privileges and appurtenances," etc., and afterwards buys a mill lower down, which is injured by such diversion. *Id.*
7. EVERY RIPARIAN OWNER HAS RIGHT TO REASONABLE USE OF WATER in a stream flowing through his land, for domestic, manufacturing, and agricultural purposes, subject to the equal right of every other riparian owner to the same reasonable use, and is liable to owners below him only for an entire diversion or abstraction of the water in such stream, or for an unreasonable use thereof. *Elliot v. Fitchburg R. R. Co.*, 85.
6. REASONABleness OF USE OF WATER IN STREAM by a riparian owner depends upon the quantity taken, the size of the stream, and various other circumstances. *Id.*
9. RIPARIAN OWNER MUST SHOW ACTUAL PERCEPTIBLE DAMAGE BY DIVERSION of the water in a stream flowing through his land, by another riparian owner, before he can recover therefor. *Id.*
10. RIPARIAN OWNER INCREASING FLOW OF WATER EQUAL TO QUANTITY TAKEN from a stream flowing through his land, by means of excavations and ditches, all constituting part of the same improvement, is not liable for a diversion to a proprietor below. *Id.*
11. EVERY PROPRIETOR UPON EACH BANK OF RIVER is entitled to the land covered with water in front of his bank to the middle of the stream, has a right to use the water flowing over it in its natural current, without diminution or obstruction, and it is immaterial whether the party be a proprietor above or below on the river. *Cowles v. Kidder*, 287.
12. ERECTING DAM UPON STREAM, BELOW POINT WHERE PLAINTIFF MAINTAINS MILL, in such a manner as to throw the water back upon plaintiff's land and obstruct the use of his mill, is an injury for which he is entitled to demand redress. In such a case the law will presume damage. *Id.*
13. ERECTION OF DAM ACROSS STREAM in such a manner as to throw the water back upon plaintiff's land, being a wrongful act, should render the defendant liable for any injury resulting from its erection and maintenance, such as stopping a floe of ice, and causing it to interfere with plaintiff's mill. *Id.*
14. ONE WHO ERECTS DAM ON HIS OWN LAND IS RESPONSIBLE FOR ALL INJURY caused by it to the land of another in times of usual, ordinary, and expected freshets. *McCoy v. Danley*, 680.
15. SOVEREIGN HAS RIGHT TO WRECKS AND ALL PROPERTY STRANDED on the sea-beach. *Hesfield v. Baum*, 563.

See BOUNDARIES; EASEMENTS, 3; TRESPASS, 1.

WAYS.

See EASEMENTS; HIGHWAYS.

WIFE'S EQUITY.

See MARRIED WOMEN.

WILLS.

1. REGISTER, AS TO PROBATE OF WILL, IS JUDGEX, and the admission of a will to probate is a judicial decision. *Holiday v. Ward*, 671.
2. JUDGMENT OF REGISTER IN FAVOR OF WILL IS EVIDENCE OF ITS VALIDITY in all respects whatever, conclusive as to personal property, and presumptive as to real property. Such judgment can only be set aside on appeal, and can not be impeached in any other proceeding. *Id.*
3. VALIDITY OF WILL IS INFERRED BY LAW FROM REGISTER'S DECISION ITSELF, and not from the evidence on which the decision was based. *Id.*
4. VALIDITY OF WILL, SO FAR AS IT AFFECTS REALTY, MAY BE CONTRADICTED and disproved in ejectment or partition, by showing that it was not legally executed, or that the testator was, at the time of making it, insane, under duress, or influenced by the fraudulent practice of some interested party. *Id.*
5. WHERE WILL HAS BEEN APPROVED BY REGISTER, it is still no more than *prima facie* evidence of its validity in a subsequent ejectment for land devised by it; but no court will look into the evidence given on the trial of the issue and reject the will altogether if it appears that an interested witness had been examined. *Id.*
6. EVIDENCE DEHOES WILL THAT IT WAS MADE UNDER MISTAKE as to the supposed death of the son of the testatrix, whose name was omitted therefrom, is inadmissible to impeach the will, but the mistake must appear on the face of the will, and it must also appear what the will would have been but for the mistake. *Gifford v. Dyer*, 708.
7. CONSTRUCTION OF WILL MADE IN ALABAMA in relation to property in that state at the testator's death must be such as would be given to it by the courts of Alabama. *Sale v. Saunders*, 157.
8. INTRODUCTORY WORDS IN WILL ARE TO BE CONSIDERED in order to ascertain the intention of the testator. And where a testator, who has no other real estate, in the introduction to his will uses the words "as to such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner," and then goes on to give, devise, and bequeath unto his wife a portion of his plantation, providing that the residue of the plantation be divided among his brothers and sisters, the widow will take a fee in the land devised to her. *Schrivener v. Meyer*, 634.
9. DESCRIPTION OF SUBJECT OF BEQUEST, IF FALSE IN PART, MAY BE MADE SUFFICIENTLY CERTAIN to identify it, by reference to extrinsic circumstances. *McCall v. McCall*, 733.
10. CERTAINTY IN DESCRIPTION IS SUFFICIENT TO SUSTAIN BEQUEST, and slaves named "Little Harriet" and "Manza" pass under a bequest of "Little Harry" and "Alonzo," where a testatrix owning sixty-four slaves bequeathed sixty-two by name, two of which were called "Little Harry" and "Alonzo," and afterwards by codicil bequeathed two others by

- same, as "two negroes not named in her said will," the testatrix having no other slaves except Little Harriet and Manza, and none by the names of "Little Harry" and "Alonzo." *Id.*
11. LANDS ACQUIRED BY TESTATOR SUBSEQUENT TO DATE OF WILL will pass by devise where such appears to be the intention of the testator. *Doe d. Wynne v. Wynne*, 139.
 12. WHERE TESTATOR USES GENERAL WORDS CONVEYING his whole estate, all that he has at his decease will pass thereby. *Id.*
 13. WHERE PROPERTY DEVISED BY WILL IS SITUATED IN ONE STATE and the will was executed in another, the law of the former will prevail in determining the right of parties to take under the will. *Id.*
 14. INTENTION OF TESTATOR MUST GOVERN IN CONSTRUCTION OF WILLS wherever the same is practicable. *Id.*
 15. ESTATE OF EACH LEGATEE IS ABSOLUTE, BUT DEFEASIBLE ON CONTINUENCY of his dying without issue, leaving one or more of his brothers surviving, where a testator bequeathed the remainder of his estate to his four sons, "to them and their heirs forever," but "if either of my sons should die without issue, his part shall be equally divided between the survivors;" and a son who died leaving issue has no interest which his administrator can claim, in the share of his only surviving brother, who afterwards died without issue. *Lowry v. O'Bryan*, 727.
 16. PARTICULAR TENANT OF PERSONALTY CAN NOT CARRY IT BEYOND JURISDICTION of the court, on a bequest by a testator of slaves and other personalty to his granddaughter, with the limitation that the property is to go over if she dies before she arrives at the age of twenty-one. *Braswell v. Morehead*, 586.
 17. PARTICULAR TENANT IS ENTITLED TO HIRE AND PROFITS of the slaves until the event happens on which they are limited over, on a bequest by a testator to his granddaughter with a limitation that the property is to go over if she die before she attains the age of twenty-one. *Id.*

See DOWER, 4, 5; EXECUTORS AND ADMINISTRATORS, 13; MARRIED WOMEN, 8-23.

WITNESSES.

1. PAYEE OF PROMISSORY NOTE INDORSING IT WITHOUT RECOURSE IS COMPETENT WITNESS for the indorsee in an action against the maker. *Edgerly v. Shaw*, 349.
2. SURETY ON ADMINISTRATOR'S BOND IS NOT INCOMPETENT AS WITNESS FOR ADMINISTRATOR because of a breach of a covenant in the administrator's deed of the decedent's realty. *Merrill v. Harris*, 359.
3. ADVERSE PARTY HAS RIGHT TO BENEFIT OF ANY ANSWER OF WITNESS testifying against him, either orally or by deposition, if he thinks such answer favorable to him, and the party examining the witness can not suppress such answer. *Linfield v. Old Colony R. R. Corp.*, 124.
4. PARTY INTENDING NOT TO USE ANSWERS IN DEPOSITION TAKEN BY HIM, except in reply to testimony which he expects to be introduced, but which is not introduced, on the other side, must give distinct notice of such intention at the time, or he can not prevent the reading of such answers by his adversary at the trial. *Id.*

5. ON RE-EXAMINATION OF WITNESS, HE CAN NOT BE QUESTIONED in reference to matters not inquired into on his cross-examination. *Dutton v. Woodman*, 46.
6. WITNESS MAY BE DISCREDITED BY EVIDENCE THAT HE HAS MADE DIFFERENT STATEMENT on a former occasion, although the precise words used on that occasion can not be proved; nor need he be first asked whether he has ever testified differently. But the previous statement can not be used to prove the fact to be as then stated by him. *Gould v. Norfolk Lead Co.*, 50.

See ACKNOW, 6; CORPORATIONS, 3; EQUITY, 4, 5, 10; EVIDENCE, 11; WILLS, 5.

WRECKS.

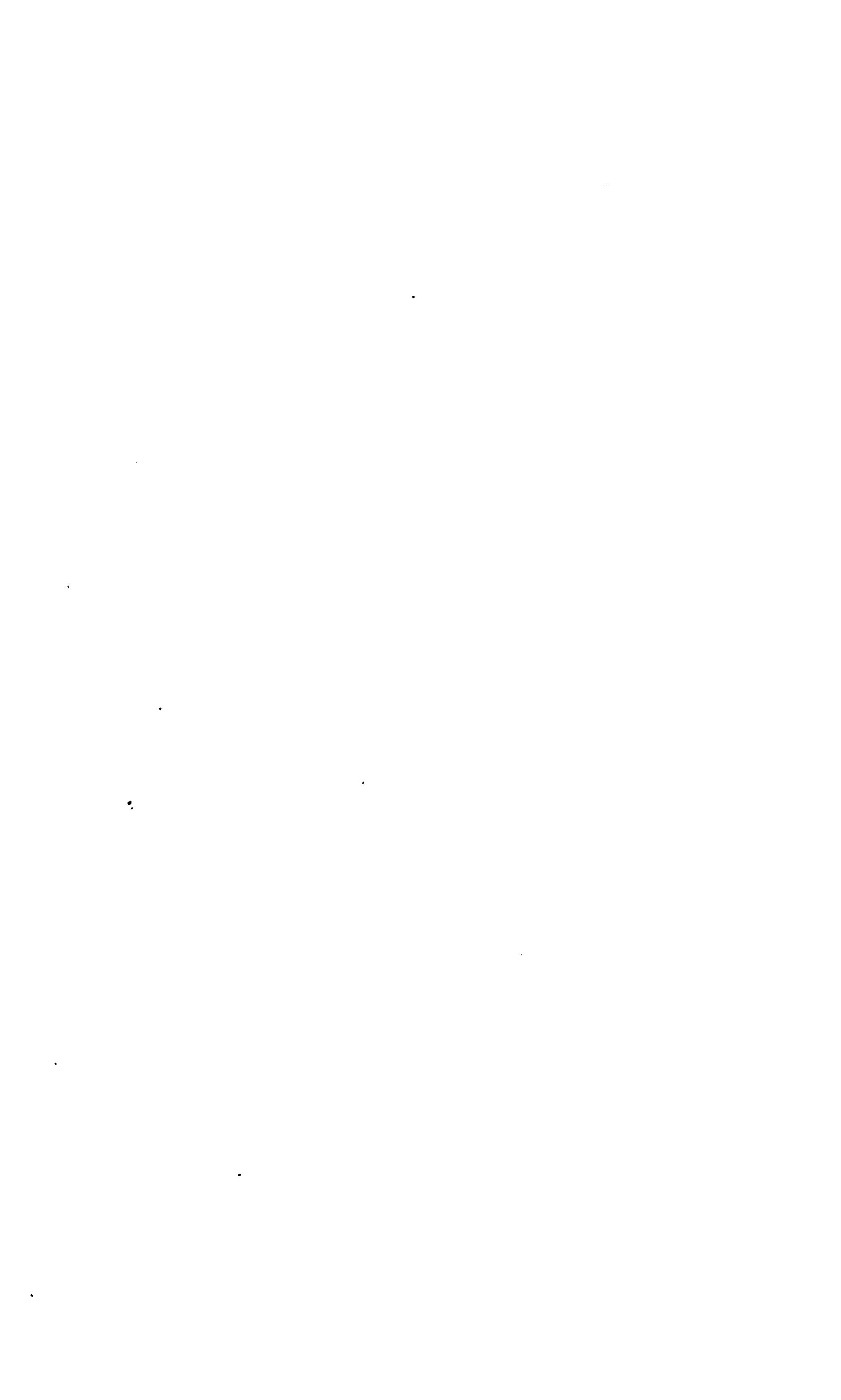
See EASMENTS, 3; TRESPASS, 1; WATERCOURSES, 15.

WRIT OF ENTRY.

See ADVANTED POSITION, 3; COVENANTS, 4.

WRITS.

See INJUNCTIONS; PROCESSES, 3.



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